86-1143

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NABOR ORTEGA, AURELIO GONZALEZ,
and all other similarly situated,
Petitioners,

v.

BILL M. ROWE, *et al.*,
Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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QUESTIONS PRESENTED

1. Whether the holding of *Daniels v. Williams*, 474 U.S. ___(1986), applies to injuries caused by negligent government policies?

2. Whether *Daniels v. Williams*, 474 U.S. ___(1986), overrules the *Bell v. Wolfish*, 441 U.S. 520 (1979), standard for determining the constitutionality of general conditions of confinement for civil detainees?

3. Whether Respondents' actions in using local jails, including their failure to assure that there was a responsible authority operating the Lubbock City Jail prior to incarcerating thousands of detainees there, demonstrated deliberate indifference sufficient to state a claim under the Due Process clause of the Fifth and Fourteenth Amendments?

4. Whether Respondents' policies for the use of local jails and the general conditions of confinement in the Lubbock City jail, including the lack of supervision, mattresses, blankets, heat, and attorney access, violated Petitioners' Fifth and Fourteenth Amendment rights?

PARTIES

The parties in the Court of Appeals, whose judgment Petitioners seek to have reviewed, include Petitioners Nabor Ortega and Aurelio Gonzalez and the class they represent,[1] as well as Respondents United States of America, the Immigration and Naturalization Service, the City of Lubbock, and various officials of those government entities.[2]

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[1] Petitioners were certified to represent a Rule 23(b)(2) class defined as all persons "who are or will be incarcerated in city and county jails by agents of the Lubbock Station of the United States Border Patrol within its 28 county jurisdiction."

[2] These officials include: Bill M. Rowe, the Patrol-Agent-In-Charge of the Lubbock Border Patrol Station; Hugh Ruston, the Chief Patrol Agent of the Marfa Border Patrol Sector, who was Rowe's immediate supervisor; and the Mayor of the City of Lubbock. The two Border Patrol agents were sued in their official and personal capacities, the Mayor in his official capacity only.

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The opinion of the Court of Appeals is reported at 796 F.2d 765 and is reprinted in Appendix A to this petition. The opinion of the District Court for the Northern District of Texas was not published and is reprinted as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on August 11, 1986. A timely Petition for Rehearing and Rehearing *en banc* was denied on October 14, 1986, and this Petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Fifth Amendment

> No person shall be . . . deprived of life, liberty, or property, without due process of law;. . .

Fourteenth Amendment

> ... nor shall any State deprive any person of life, liberty, or property without due process of law; . . .

42 U.S.C. § 1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the dep-

> rivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...

STATEMENT OF THE CASE

This case[2] challenges the conditions of confinement under which the Immigration and Naturalization Service (INS) detained suspected aliens in the Lubbock City Jail. Petitioners allege that the totality of conditions in that jail, including the lack of supervision, the absence of mattresses and blankets, filthy and needlessly overcrowded cells, lack of heat, and effective denial of attorney access, violated the Fifth and Fourteenth Amendment rights of Petitioners and thousands of other suspected aliens held in the jail between 1978 and 1981. Petitioners allege that these unconstitutional conditions were caused, *inter alia*, by the failure of INS and the City of Lubbock to adopt adequate policies and procedures for using the jail. Petitioners also allege that INS' policy failure caused it to incarcerate detainees under unconstitutional conditions in other jails in the Lubbock area. Petitioners sought damages for themselves from the City of Lubbock and the individual Defendants and injunctive relief for their class against INS and the City. Jurisdiction was based upon 28 U.S.C. §§ 1331, 1343(3), and 1361, and 8 U.S.C. § 1329.

The Border Patrol Station in Lubbock, Texas operates no jails of its own in its 28 county jurisdiction.[3]Like many other border patrol stations, it relies on local city and county jails to detain suspected immigration law violators until they can be transported south to another facility or removed to Mexico. Respondent Rowe, acting under the supervision of Respondent Rushton, was delegated policymaking authority with regard to the detention of these suspected aliens, including the authority to determine which local jails the Station would use. INS had almost no written policies or procedures governing the use of local jails to which Rowe could look for guidance. INS did not require local jails to be inspected for safety or compliance with any set of minimum standards prior to use and did not require written contracts with local authorities delineating the respective responsibilities of INS and the local jail or the INS detainees. INS provided Rowe with no training in the selection, use, or inspection of local jails, or standards for evaluating the conditions in those jails.[4]

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[2] This statement of facts is based on the fact findings of the district court which were accepted by the Court of Appeals, and undisputed facts in the record with respect to which the district court made no findings.

In conformance with those policies, Rowe did not inquire into the conditions in the jails he selected.

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[3] The United States Border Patrol is the uniformed enforcement branch of the Immigration and Naturalization Service. The Lubbock Station consists of a Patrol Agent In Charge and three other agents.

[4] The only written INS jail use policy required that a bookkeeping record, a form G-324, be filled out for each jail. This policy was not followed or enforced in Lubbock. Respondent Rushton issued a few brief jail policy statements regarding the detention of minors, and persons with medical problems but nothing more. See Plaintiffs' Ex. 8. *Compare Logue v. United States*, 412 U.S. 521 (1973)(U.S. Marshals Service enters into detailed written agreements with local jails it uses to hold federal prisoner).

Neither did Rowe discuss the division of responsibilities between INS and the jail. His discussions with local authorities focused almost entirely on how much money per man-day INS would pay for use of the jails. Although Rushton was Rowe's supervisor, neither he nor anyone else at INS checked on the conditions in the jails used by Rowe prior to this lawsuit, nor did he take other steps to supervise Rowe's use of local jails.

Between 1977 and 1982, the Lubbock INS Station used the Lubbock City Jail as its primary jail facility, holding approximately 7000 suspected aliens there during that time.[5] When the Lubbock jail was first selected by INS in 1977, the City housed its own prisoners in the jail and the City jailer cared for the INS detainees along with the City's prisoners. However, in January 1978, the City Council decided to cease operating its jail. The position of jailer was permanently terminated and all of the City prisoners were transferred to the new County jail.

The Lubbock Police Chief informed Agent Rowe of these changes, but neither he nor Rowe discussed how these changes would affect INS' use of the jail. Rowe simply continued to place his detainees in the jail on the blind assumption that the City would take responsibility for them. The City, for its part, continued to accept payment of $6.50 per man-day from INS, but assumed it was "renting space" to INS, not operating a jail. Neither took responsibility for confirming their assumptions, and they claimed never to have discovered their confusion.

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[5] The Lubbock Station used more than thirty other jails during this same period.

For the next four years, from January 1978 until December 1981 when this suit was filed, "federal agents believed that Lubbock officials were responsible for maintaining the jails, while local officials believed that operations were within the province of the Border Patrol." 796 F.2d at 767. With both the City and INS "blindly assuming away [their] responsibilities" for the jail, 796 F.2d at 768-9, the jail was effectively abandoned. No one took responsibility for supervising the detainees.[6] No mattresses or bedding of any kind were provided. Cells were filled with garbage and trash and were not regularly cleaned or maintained. No one even turned on the heat in the winter.[7]

Without a jailer present, the Border Patrol agents acted as jailers, physically placing the detainees in the cells. However, neither Rowe nor anyone else at INS developed guidelines or provided training as to how these tasks were to be carried out. Neither INS nor Rowe set limits on the number of detainees who could be placed in a cell, and no procedures for avoiding or monitoring overcrowding were established. As a result, even though there were enough cells available to assure that each detainee at least had a metal bunk frame to sleep on, agents routinely placed all of their detainees in one or two cells, senselessly overcrowding them to the point that detainees had to sleep on the concrete floor with only the trash for bedding.[8]

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[6] The district court found that the City desk sergeants provided supervision. However, they were not assigned responsibility for this task and did not perform it. Agent Rushton and the INS Senior Staff Advisor for Detention both admitted that the supervision in Lubbock was inadequate.

[7] The City continued to provide two meals a day as it had in the past, but "[a]ll other responsibility for detention was upon the INS. . ." App. B at 32a. Individual border patrol agents occasionally asked that the cells be swept out and occasionally provided mattresses to detainees "when they learned of any deficiency." App. B at 17a. That was not very frequently. Rowe did not notice the absence of mattresses until December 1981, although none of the detainee witnesses saw a mattress after May 1978. The cotton mattresses which were occasionally provided were never cleaned; they were simply left in the cells unwashed until they disintegrated.

Without a jailer, INS took charge of visitation as well. Rowe's only written jail policy required that all visitors, including attorneys, obtain permission from Border Patrol prior to any visit. Because the agents were frequently out on patrol, this policy, as well as others, severely limited visitation rights. As a result many aliens were deported before their attorneys were able to speak with them or before they knew an attorney had been hired for them.

In December 1981, Petitioners, two detainees released on bond pending deportation proceedings, brought this action challenging the conditions of confinement in the Lubbock City jail and the policies of INS with regard to selecting, inspecting, and using local jails for suspected aliens.

Within days after the suit was filed, INS left the Lubbock City jail and moved to the Slaton City jail as its primary holding facility. No contract was signed with Slaton, and again Agent Rowe failed to clarify who was responsible for the INS detainees. Slaton officials assumed INS was responsible for booking and placing the alien detainees in their cells, while INS assumed that Slaton was in charge. With each thinking the other was responsible, neither Rowe nor the Slaton officials set any limits on the number of INS detainees that could be placed in the cells in Slaton. Once again, senseless overcrowding resulted, overcrowding the Slaton police chief was aware of, but believed he could do nothing about because he thought that INS was responsible for the detainees. In September 1982 a detainee broke his neck in a grossly overcrowded cell in Slaton[9] and shortly thereafter INS ceased using the Slaton jail. Similar overcrowding and unsafe conditions occurred in other jails utilized by INS.[10]

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[8] Detainees testified to numerous incidents where 20 to 45 people were placed in a single 15 bunk cell, even though in every one of these incidents there were more than enough empty cells in the jail to accomodate all of the detainees. Twenty people in the cell left only 14 square feet per person.

At trial INS' Senior Staff Advisor for Detention admitted that prior to this suit INS' policies for using local jails were inadequate and that the lack of a written contract had contributed to the confusion over responsibility for the Lubbock City jail.

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[9] On this occasion INS agents placed sixteen detainees in a six-man cell, despite the fact that the cell right next door, which was reserved for INS detainees, was empty. Even after this incident, INS issued no policies to control or monitor overcrowding.

[10] For example, INS used the Haskell County jail for several years where the only "supervision" provided for detainees at night was a metal pipe running through the cellblock, across the ceiling, and through the Sheriff's bedroom on the second floor of the jail. Detainees were expected to bang on the pipe to wake the Sheriff in case of an emergency. The INS Senior Staff Advisor for Detention admitted that this was inadequate supervision, but INS jail use policies were such that this inadequate supervision was never discovered.

After a seven day trial, the district court entered judgment for Defendants. The district court recognized that "plaintiffs brought out by cross examination of the defendants witnesses that specific conditions such as lack of fire warning devices, two meals a day, no blankets and mattresses, and trashy floors did not constitute a legitimate governmental purpose." App. B at 30a. Nevertheless, the district court held that those conditions were related to the "legitimate government purpose of detaining [aliens] for a short period of time pending deportation," *Id.*, and therefore were not unconstitutional under the standard set forth in *Bell v. Wolfish*, 441 U.S. 520, 539 (1979). Nowhere in its opinion did the district court address the admitted fact that neither INS nor Lubbock made any effort to discover who was in charge of the City jail during the four years that INS used it.

The Fifth Circuit affirmed on other grounds. The Court recognized that the conditions in the Lubbock jail were "squalid" and assumed that those conditions were caused by the policies and procedures of INS and the City—i.e. the "sloppy system of cooperation" between INS and the City of Lubbock, the "lack of specific rules under which INS would use local jails" and the failure to establish "clear guidelines." 796 F.2d at 768. Nevertheless, the Court refused to analyze the case under the *Bell v. Wolfish* standard, holding that the decisions in *Daniels v. Williams*, 474 U.S. (1986), and *Davidson v. Cannon*, 474 U.S. ___ (1986), "rendered much of *Bell's* language surplusage." 796 F.2d at 768. Instead, the Panel found that the

Respondents' conduct in "blindly assuming away [their] responsibilities" for the INS detainees was merely negligent, and that such conduct "is not the kind proscribed by the due process clauses of the fifth and fourteenth amendments, as interpreted by *Daniels* and *Davidson.*" 796 F.2d at 768-9.[11] Finally, the Panel held that Respondents' blind neglect of the thousands of detainees held in Lubbock between 1978 and 1981 did not rise to the level of deliberate indifference "in light of the rather broad definition of 'negligence' in *Davidson* [*v. Cannon*]. . ." 796 F.2d at 768 n.5.

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit's Opinion Conflicts In Principle with *Daniels v. Williams*

In *Daniels v. Williams* this Court held that "the Due Process clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property." 106 S.Ct. 662, 663 (1982). The Fifth Circuit's opinion in this case extends *Daniels* to hold that injuries caused by negligent government policies do not state a due process violation either. This extension of *Daniels* is directly contrary to the reasoning of *Daniels* and is of such critical importance to the enforcement of the due process clause as to warrant review by this Court.

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[11] The Court of Appeals opinion does not distinguish between the conduct of Rowe and Rushton in their individual capacities, and official conduct attributable to INS and the City—i.e. the policies and customs of INS and the City. The Court of Appeals simply holds that "appellees' conduct" was negligent. 796 F.2d at 769. In fact, all of the conduct at issue here represents official policy attributable to the government defendants since even the individual defendants, Rowe and Rushton, were policy-making officials with respect to the jail procedures and practices at issue.

Daniels recognizes that the "touchstone of due process is protection of the individual against arbitrary action of government." 106 S.Ct. at 665. Negligent acts of individual officials are, by definition, random and unauthorized. They are the result of human error and are only coincidentally connected with the exercise of state power. For this reason, individual negligent conduct cannot be considered "arbitrary action of government" and thus does not amount to a deprivation in a constitutional sense.

This same logic compels the opposite conclusion with respect to injuries caused by negligent policies. A government policy is, by definition, a deliberate, authorized action of government, regardless of whether the policy is adopted wilfully, negligently, or in good faith.[12] The policies by which INS and the City of Lubbock operated the City jail constituted the "action of government" even if those policies were merely negligent. Certainly those policies were not coincidental to the exercise of government power in the sense that the dropping of a pillow by the guard in *Daniels* was coincidental to the fact that the guard was a state official.[13]

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[12] A policy is defined as "a deliberate choice to follow a course of action . . . made from among various alternatives. . ." *Pembaur v. City of Cincinnati,* ___ U.S. ___, 106 S.Ct. 1292, 1300 (1986).

[13] Of course the policies of INS and the City were policies of omission: the failure to have a written contract, the failure to assure that there was a responsible authority operating the jail prior to placing prisoners there, and the failure to promulgate

Whenever a government policy deprives a person of life, liberty, or property, government action itself has caused injury. Individuals who suffer injury from negligent policies are no less the victims of the "arbitrary action of government" than individuals injured by other kinds of government policies.[14] For this reason, negligent government policies which cause injury are actionable under the due process clause, even though deprivations caused by the negligent conduct of individual government officials are not.

That negligence is irrelevant to the question of whether a policy violates due process is made clear by the way the *Daniels* opinion distinguishes *Wolff v. McDonnell*, 418 U.S. 539 (1974). In *Wolff* the Court found that a policy to deprive inmates of good-time credits without a hearing violated due process. Daniels argued this was an example of individual negligence violating due process. The Court responded,

> We think the relevant action of the prison officials in that situation is their deliberate decision to deprive the inmate of good-time credit, not their hypothetically negligent failure to accord him the procedural protections of the Due Process clause.

106 S.Ct. at 666. That is, the prison officials were liable because of the policy they were pursuing. The fact that the constitutional flaw in the policy—the

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procedures or policies for using local jails. But INS' and the City's decision not to adopt policies was a deliberate choice on their part just as a decision to adopt policies would have been.

[14] Negligent policies which cause injury are, by definition, more arbitrary than carefully thoughtout policies. Cf. *Bell v. Wolfish*, 441 U.S. 520, 539 (1979).

failure to provide for hearings—may have been the result of negligence was irrelevant to the question of whether the policy violated due process.

This Court has on other occasions held government entities liable for injuries caused by negligent policies. Most recently, in *Pembaur v. City of Cincinnati*, ___ U.S. ___, 106 S.Ct. 1292 (1986), the Court upheld City liability for an unlawful entry because the City Attorney, as a City policymaker, authorized the entry. The facts of the case make clear that the City Attorney's "policy" was merely negligent and, given the fact that *Steagald v. United States*, 451 U.S. 204 (1981), had not been decided at the time the advice was given, it would be more accurate to say that the policy was made in complete good faith. Yet, it is clear from the Court's opinion that the City Attorney's relative negligence or good faith in making policy was irrelevant to the City's liability for the policy.

Similarly, in *Owen v. City of Independence*, 445 U.S. 622 (1980), the action of the city council which caused the due process deprivation was at worst negligent. Nevertheless, the Court denied the City the right to claim good faith immunity and, in doing so, stressed the importance of holding government entities liable for all of their constitutional violations—including their unintentional violations.

> [T]he knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting cit-

> izens' constitutional rights. Furthermore, the threat that damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of *unintentional infringements* on constitutional rights. Such procedures are particularly beneficial in preventing those "systemic" injuries that result not so much from the conduct of any single individual, but from the interactive behavior of several government officials, each of whom may be acting in good faith.

Owen, 445 U.S. at 651-52 (emph. added). See also *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) (state procedure which unintentionally deprived party of cause of action for employment discrimination violates due process). This case presents precisely the sort of "unintentional . . . systemic injur[y]" caused by "the interactive behavior of several government officials each of whom may be acting in good faith" for which the Court sought to provide a remedy in *Owen*. The Fifth Circuit's decision to excuse 'negligent' policies directly contradicts *Owen*.

On the other hand, this Court has on occasion required that government policies manifest more than mere negligence in order to establish a due process violation. *See e.g. City of Oklahoma City v. Tuttle*, _ U.S. ___, 105 S.Ct. 2427 (1985)(inadequate police training must amount to 'deliberate indifference' or 'gross negligence' to establish constitutional violation); *City of Springfield v. Kibbe*, S.Ct. No. 85-1217, *cert. granted* 54 U.S.L.W. 3598 (March 11, 1986). *See also, Languirand v. Hayden*, 717 F.2d 220 (5th Cir. 1983) *cert. den.* 104 S.Ct. 1687 (1984); *Doe v. N.Y.Dept. of Social Services,* 649 F.2d 134 (2nd Cir. 1982), *after remand,* 709 F.2d 782 (2nd Cir. 1982), *cert. den. sub nom. Catholic Home Bureau v. Doe,* ___ U.S. ___, 104 S.Ct. 195 (1983).

This case provides an opportunity to resolve the apparent conflict between cases like *Wolff, Pembaur,* and *Owen,* in which the negligence or good faith of a policy is irrelevant to the finding of a due process violation, and cases like *Tuttle* and the others cited above in which a policy must manifest deliberate indifference in order to constitute a due process violation.

This case makes clear that the contradiction between these two lines is more apparent than real. It represents a problem of causation rather than a disagreement as to the elements of a due process claim against a government entity. The question of deliberate indifference arises in cases where the causal link between the policy and the constitutional injury is attenuated. For example, in *Tuttle* the injury was caused directly by the unlawful act of an individual police officer which was in turn caused by the city's failure to train the officer. Thus, the unlawful act of the individual police officer stood as an intervening cause between the policy of the city and the injury. The causal link was further attenuated by the fact that the policy at issue, a failure to train, was a policy of omission, rather than an affirmative policy. For these reasons, something more than negligence had to be shown to establish a causal link between the policy and the injury.

On the other hand, where the policy itself directly causes the injury and there is no intervening cause between the policy and the injury, deliberate indifference should not have to be shown to establish that the injury resulted from "arbitrary action of government." Thus, for example, in *Wolff, Pembaur, Logan,* and *Owen* it was not necessary to discuss whether the government entity acted deliberately or negligently because in each of those cases the policy in question directly caused the plaintiff's injury.

The facts of this case place it between cases like *Tuttle*, on the one hand, and those like *Logan, Owen,* and *Pembaur*, on the other. Like *Tuttle*, this case generally involves policies of omission rather than affirmative policies such as those in *Logan* or *Pembaur*. Yet, like *Logan, Owen,* and *Pembaur*, the causal link between the Respondents' policies and the constitutional deprivation is direct: The deplorable conditions in the jail were systematic and pervasive problems which resulted directly from Respondents' deliberate policy not to take responsibility for the jail.[15]

Because this case combines the factual elements of cases like *Tuttle* which require deliberate indifference, and cases like *Logan, Owen,* and *Pembaur* which do not, it provides a particularly appropriate vehicle for clarifying the apparent contradiction between those two lines of cases with respect to the state of mind necessary to establish government liability for injuries caused by official policies.

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[15] This case is, in this respect, the opposite of *Tuttle*. The individual border patrol agents, unlike the officer who shot Tuttle, were not intervening causes of Petitioners' injury. Rather, the individual border patrol agents attempted, at least on occasion, to alleviate the aliens' suffering as best they could. Unfortunately, the occasional efforts of individual agents could not substitute for the lack policies or procedures for operating the jail.

Finally, this case presents an opportunity to address the question, left open in *City of Oklahoma City v. Tuttle*, whether a policy of omission, such as inadequate training or inadequate jail procedures, can be a policy under *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978). *Compare Tuttle*, 105 S.Ct. at 2436 n. 7, *with* 105 S.Ct. at 2441 n. 8 (Brennan, J., concurring). Certainly where a government engages in activity as inherently dangerous as operating a jail, the government has a constitutional duty to adopt adequate procedures, and its failure to do so must be subject to constitutional review. *Youngberg v. Romero*, 457 U.S. 307 (1982). For, in such circumstances, the "risk of injury is so high that the government's failure to make efforts to avoid the injury is unacceptable, even if its omission still might be characterized as negligent." *Davidson*, 106 S.Ct. at 673 n.2 (Blackmun, J., dissenting).[16]

All of these questions are of great national importance affecting virtually all Section 1983 actions against government entities. The Fifth Circuit opinion in this case is particularly threatening to Due Process enforcement insofar as it appears to limit *Owen v.*

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[16] In many respects, Respondents' policies of omission represent a far more egregious abuse of government power than affirmative policies, such as those at issue in *Wolff v. McDonnell*, 418 U.S. 539. At least in the latter case, the government is taking some responsibility and attempting to exercise professional judgment, however flawed that judgment may be. Cf. *Youngberg*. Here, the Respondents simply abdicated all responsibility for the detainees in their custody; they made no attempt to exercise professional judgment at all.

City of Independence, 445 U.S. 662 (1980). As noted above, this case presents precisely the sort of "systemic" "unintentional infringement" of constitutional rights which the Court intended to deter by denying municipalities good faith immunity. *Owen*, 445 U.S. at 651-652. Yet the Fifth Circuit has now held that government entities are not liable for these violations.

The Fifth Circuit's refusal to recognize that negligent government policies can violate the Due Process clause will have an especially profound impact upon the rights of those incarcerated by the government. Unconstitutional conditions in jails and other institutions, more often than not, are the result of negligent omissions such as those at issue here:

> Many conditions of confinement . . . including overcrowding, poor sanitation, and inadequate safety procedures arise from neglect rather than policy. There is no reason of comity, judicial restraint, or recognition of expertise for courts to defer to *negligent omissions* of officials who lack resources or motivation to operate prisons with limits of decency. Courts must and do recognize the primacy of the legislative and executive authorities in the administration of prisons; however, if prison authorities do not conform to constitutional minima, the courts are under an obligation to take steps to remedy the violations.

Rhodes v. Chapman, 452 U.S. 337, 362 (1981)(Brennan, J., concurring)(emph. added).

The Fifth Circuit's decision raises the spectre of undoing years of law defining minimum acceptable jail conditions and paves the way for a return to the days when prisons and prisoners' rights were largely ignored by the federal judiciary.

II. THE FIFTH CIRCUIT'S DEFINITION OF DELIBERATE INDIFFERENCE IS CONTRARY TO THE REASONING OF *DAVIDSON v. CANNON*

The Fifth Circuit relied upon what it perceived as the "rather broad definition of negligence" in *Davidson v. Cannon*, ___ U.S. ___, 106 S.Ct. 668 (1986), to find that INS and the City of Lubbock were merely negligent in "blindly assuming away [their] responsibilities" for the alien detainees. This holding is contrary to *Davidson* and creates a standard of negligence which will be virtually impossible to prove.

Contrary to the Court of Appeals, *Davidson* does not establish a standard of negligence. The question of negligence or deliberate indifference was not before the Court in that case. As the majority opinion emphasized,

> petitioner does not challenge the District Court's finding that respondents 'did not act with deliberate or callous indifference to [petitioner's] needs.' Instead he claims only that respondents 'negligently failed to protect him from another inmate.'

106 S.Ct. at 670. Since Davidson conceded the issue of negligence, the Court did not need to decide whether the same actions might have been characterized as deliberate or reckless indifference.

The Fifth Circuit's comparison of this case to *Davidson* also reflects a fundamental error in the definition of deliberate indifference used by the court. *Davidson* involved a single isolated incident. In contrast, the "blind neglect" at issue in this case continued for more than four years and even continued after this suit was filed. Such repeated failure to take corrective action should give rise to a presumption of deliberate indifference. *Doe v. NY Dept. of Social Services*, 649 F.2d at 142-143; *Grandstaff v. City of Borger*, 767 F.2d 161 (5th Cir. 1985), *petition for cert. filed* 54 U.S.L.W. 3664 (March 27, 1986).

Moreover, the record is clear that INS and the City of Lubbock knew or should have known of the squalid conditions in the Lubbock jail. Agent Rowe and the City knew as early as January 1978 that the City had fired its jailer and was no longer housing its own prisoners in the jail—yet over the next four years they never discussed who was in charge of the jail. Both had every opportunity to discover the problems. Rowe placed detainees in the jail every week during that period but, as a matter of routine procedure, did not look into the cells to check their condition. Chief of Police Alley and his Assistant Chief were stationed in the same building as the cells and accepted payment for every alien in the jail, yet during those four years they never looked into the cells to see what conditions were like. Even after this suit was filed alleging overcrowding and confusion over responsibility for detainees, INS took no steps to correct either of these problems when it moved to Slaton. That the government could operate this way, placing thousands of detainees in a jail without taking minimal steps to assure that someone was in charge of the jail is as shocking as it is incredible. If such extraordinary disregard for the lives and safety of those in the government's custody does not amount to deliberate indifference, it is difficult to imagine what would.

In the wake of *Davidson*, the appropriate definition of deliberate indifference has become a critical issue, particularly in the context of systematic policy failures such as occurred in this case. The Court should grant certiorari in this case to provide the courts with guidance on this issue.

III. THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH *BELL v. WOLFISH*

INS detainees, such as Petitioners, are civil detainees. They have not been charged with a crime. Thus, although they may be confined, the Fifth Amendment protects their right to be held in conditions which do not inflict punishment. In *Bell v. Wolfish*, 441 U.S. 520 (1979), this Court adopted the following standard for determining whether jail conditions inflict unconstitutional punishment:

> [I]f a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to "punishment." Conversely, if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted on detainees *qua* detainees.

441 U.S. at 539 (footnotes omitted).

The Fifth Circuit opinion in this case holds that *Daniels* overrules this standard in part:

> [I]n cases involving only simple negligence of the officials responsible, *Daniels* and *Davidson* render much of *Bell's* language surplu-

> sage. Only if the evidence suggests that the appellees knew of the jails conditions, or intended to force the detainees to endure such conditions, would a *Bell* analysis retain vitality.

796 F.2d at 767. This conclusion misapplies *Bell* with ominous implications for the rights of civil and pretrial detainees.

Bell is concerned with conditions of confinement which result from official government custom or policy. When the government deprives an individual of his or her liberty by locking that individual in jail, the government has a constitutional duty to assure that the conditions in the jail comply with minimum standards of decency, that is conditions which do not inflict punishment. The government may not infringe upon these substantive due process rights and nothing in *Daniels* suggests otherwise. To the contrary, *Daniels* reaffirms that "certain government actions" are barred by the Due Process clause "regardless of the fairness of the procedures used to implement them." 106 S.Ct. at 665.

The Fifth Circuit decision effectively eliminates the substantive due process rights of detainees. By holding that *Bell* has been overruled in part by *Daniels*, the Court of Appeals replaces the government's duty to protect detainees from squalid jail conditions with a standard that excuses the government from liability as long as the government can avoid actual knowledge of how bad the conditions are. Even where, as here, the government "should have known" that its policies were inadequate to protect detainees from senseless punishment, the Fifth Circuit would impose no liability.[17]

This is not the law. The Constitution's guarantee that the government shall not subject detainees to punishment imposes an affirmative duty on government to establish policies and procedures adequate to assure non-punitive jail conditions.[18] The government may not blindly assume away its Constitutional responsibility to assure that detainees are held under conditions reasonably designed to be free from punishment by cultivating an ostrich-like ignorance of the actual conditions under which it confines its detainees.[19]

The conditions at issue in this case clearly amount to punishment under the *Bell* standard. Blind neglect is not reasonably related to any legitimate government goal; it is by definition arbitrary and purposeless and Defendants admitted as much. The District Court's finding that the conditions of confinement were related to the "legitimate government purpose of detaining [aliens] for a short period of time pending deportation" App. B at 30a, is also unavailing. Such a purpose justifies the fact of incarceration, but it cannot justify the specific conditions of that confinement, such as the lack of supervision, heat, mattresses, blankets, and fire protection. The opinion in this case with respect to specific conditions, such as the absence of mattresses, conflicts with other courts which have found such conditions unconstitutional, *Anela v. City of Wildwood*, 790 F.2d 1063, 1069 (3rd Cir. 1986) *cert. den.* ___ U.S. ___ (1986)(holding detainees overnight without mattresses violates due process); *Union County Jail Inmates v. DiBuono*, 713 F.2d 984, 996-97 (3rd Cir. 1983) *cert. den.* 465 U.S.1102 (1984)(use of floor mattresses violates due process); *Lareau v. Manson*, 651 F.2d 96 (2nd Cir. 1981)(same, regardless of length of detention). This conflict should be resolved. At the very least the Court of Appeals should be directed to evaluate the conditions in the Lubbock jail in light of the *Bell v. Wolfish* standard.

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[17] The Fifth Circuit decision states that liability may only be affixed if the "appellees knew of the jail conditions, or intended to force the detainees to endure such conditions. . ." 796 F.2d at 768. It pointedly does not say "knew or should have known."

[18] Of course, where the government has established policies and procedures adequate to protect detainees from punishment, the negligent failure of individual officials to follow those procedures does not rise to the level of a constitutional violation. *Daniels*. But that is not what happened in this case.

[19] The Fifth Circuit blames the Petitioners for not complaining to the Border Patrol about the conditions in the jail. That is tantamount to denying Petitioners and other aliens their Fifth Amendment rights simply because they are aliens unfamiliar with their rights.

IV. INS TREATMENT OF ALIENS IN CUSTODY PRESENTS AN ISSUE OF GREAT NATIONAL IMPORTANCE WHICH THIS COURT SHOULD ADDRESS

The substantive issues in this case, INS' treatment of suspected aliens in custody and INS' coordination with local jail facilities, are issues of great national importance. INS uses hundreds of local jails throughout the United States under the same policies and procedures as used in the Lubbock Border Patrol Station. Thus, the problems posed by those policies are not unique to this case, but are raised everyday throughout the country. This is not the first time serious problems have arisen with INS' use of local jails. Remarkably similar problems were reported in *Medina v. O'Neill,* 589 F.Supp. 1028 (S.D.Tex. 1984)(INS use of a private security service's detention facility without inspecting it or assuring that it provided safe conditions violated due process). The problems caused by INS' inadequate jail use procedures are likely to get worse with the recent passage of the Immigration Reform Act, 55 U.S.L.W. 275 (Dec. 23, 1986), which vastly increases the size of the Border Patrol as well as the number of aliens who will be incarcerated by INS in the future.

INS' treatment of suspected aliens while they are in custody deserves this Court's attention. As Justice Stevens noted in *Hudson v. Palmer,*

> The courts have a special obligation to protect prisoners. Prisoners are truly the outcasts of society. Disenfranchised, scorned and feared, often deservedly so, shut away from public view, prisoners are surely a 'discrete and insular minority.'

104 S.Ct. at 3216 (Stevens, J., dissenting). That special duty to protect prisoners is of critical importance where the prisoners are suspected aliens. Undocumented aliens, even more than ordinary prisoners, are a "shadow population" ignorant of their rights and unable to call public attention to their plight. This is no doubt why INS and the City of Lubbock were able to get away with operating the Lubbock City Jail in such a sloppy and indifferent manner for as long as they did. The lack of any public scrutiny of the INS' treatment of suspected aliens or other means for aliens to protect themselves from the abuses of gov-

ernment makes it critical that this Court give full consideration to this case.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted and the judgment of the Court of Appeals for the Fifth Circuit reversed or, alternatively, vacated with directions to evaluate Petitioners claims under the *Bell v. Wolfish* standard.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 85-1531

NABOR ORTEGA, AURELIO GONZALEZ,
on behalf of themselves and all others similary situated,
Plaintiffs-Appellants,
v.

BILL M. ROWE, Individually and as
U.S. Border Patrol Agent, et al.,
Defendants-Appellees.

OPINION

Filed August 11, 1986
Before: Thomas Gibbs Gee, Henry A. Politz, and
Will Garwood, Circuit Judges.

Opinion by Judge Thomas Gibbs Gee

Appeal from the United States District Court
for the Northern District of Texas
Halbert O. Woodward, District Judge, Presiding

THOMAS GIBBS GEE, Circuit Judge:

Appellants in this class action challenge conditions that existed in jails used by the United States Border Patrol in the late 1970s and early 1980s to detain illegal aliens before deporting them. Alleging that detention did, or would, violate their due process rights, appellants seek both damages and injunctive relief from federal agents and local officials. We affirm the district court's judgment for appellees, concluding that, in the light of recent Supreme

Court cases requiring due process violations to be based on more than government officials' mere negligence, the class failed to demonstrate the existence of unconstitutional behavior.

In summarizing the facts we look to the district court's findings, which we deem to be plausible in light of the evidence presented. *See Anderson v. Bessemer City*, 470 U.S. ___, 84 L.Ed.2d 518, 528 (1985). We look especially to conditions in the Lubbock city jail, the primary facility used by the Border Patrol for these purposes. In 1977, the City of Lubbock began allowing the Border Patrol to house detainees in its jail. Later that year, the city ceased using the city jail, housing its prisoners instead in Lubbock County jail. The Border Patrol was accordingly allowed to expand its use to all cells of the city facility. Although the city no longer housed its prisoners there, it continued to assume the responsibility of feeding the detainees. Border Patrol agents, meanwhile, actually booked detainees into the facility. Between 1977 and December 1981, the Border Patrol detained over 7,000 illegal aliens in the city jail.

The police of Muleshoe, Texas arrested both named appellants—Nabor Ortega in September 1981 and Amelio Gonzalez in December 1981—on suspicion of being illegal aliens. Transferred into the custody of the Border Patrol, both spent between one and three days in the city jail. They later testified that the jail was squalid; trash filled the cells and showers because of infrequent cleanings. Lacking mattresses and blankets, they were forced to sleep on cardboard boxes or sheet metal bunks. The absence of towels and soap, moreover, precluded bathing. Neither protested about these conditions; uninformed of the problems, federal agents and local officials failed to improve conditions except when an agent, noticing Gonzalez's plight, provided him with a mattress and blanket. With the testimony of others corroborating these remembrances, it be-came clear that the city jail's conditions were unpleasant in those days.

Ortega and Gonzalez—in an action perhaps unusual for illegal aliens—therefore brought this action based on their rights under the Constitution and laws of the United States against Border Patrol agents William Rowe and Hugh Rushton, the Immigration and Naturalization Service, the City of Lubbock, and the United States of America. Rowe was the agent in charge of the Lubbock Station[1] of the Border Patrol from July 1977 to August 1984, and Rushton has been Chief Patrol Agent of the Marfa Sector, the administrative area that includes the Lubbock Station, since 1980. Appellants based their suit against federal appellees on the claim that the conditions described violated their due process rights under the fifth amendment. The federal appellees also allegedly violated 8 U.S.C. § 1252 and 18 U.S.C. §§ 4002 and 4042. Appellants alleged that the city conspired with federal authorities in violation of the fourteenth amendment's due process clause. Ortega and Gonzalez sought damages for past wrongs inflicted; they coupled these individual claims to a class action[2] against appellees, seeking injunctive relief against the allegedly unconstitutional conditions. At first, only the city jail was the target of this suit, but appellants amended their complaint to seek injunctive relief against the other jails of the Lubbock Station that the Border Patrol used. Consequently, they were allowed to introduce evidence of other jails' conditions.

The district court entered judgment in appellees' favor. It first concluded that, contrary to appellants' assertion, 18 U.S.C. § 4002 does not require a written agreement between federal and local officials regarding the use of local jails to house illegal aliens. Having found the other statutory bases for appellants' complaint unavailing, the court then ruled that no due process violations occurred. Noting the short stay of most detainees in these jails (usually two or three days before they are deported), it concluded that conditions were not serious enough to be constitutional violations.

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[1] The Lubbock station covers a 28-county area around Lubbock, Texas.

[2] Ortega and Gonzalez were the representatives of a certified class of all people "who are or will be incarcerated in city and county jails by agents of the Lubbock Station of the United States Border Patrol within its 28-county jurisdiction."

On appeal, Ortega and Gonzalez continue to insist that 18 U.S.C. § 4002 requires the INS to execute written agreements with local officials for use of local jails.[3] To understand this argument, it is first necessary to recognize their perception of this case. To appellants, all the problems discussed result from insufficient delegation of responsibility. Federal agents believed that Lubbock officials were responsible for maintaining the jails, while local officials believed that operations were within the province of the Border Patrol. Resulting from informal, oral agreements, this confusion has in turn caused the problems about which the class complains. By bringing this action, appellants hope that the federal courts will force appellees to cease assuming away their responsibilities; one way to do this is to interpret § 4002 as requiring written agreements, agreements that presumably would detail the duties of both federal and local officials.

We cannot interpret § 4002 in such a manner; rather, we conclude that appellants may not use this statute as the basis for a cause of action. Other courts have held that § 4002 provides no implicit private cause of action. *See Owens v. Haas*, 601 F.2d 1242, 1247-48 (2nd Cir. 1979) *cert. denied* 444 U.S. 980 (1979); *Hampton v. Holmesburg Prison Officials*, 546 F.2d 1077, 1082 (3rd Cir. 1976); *Williams v. United States*, 405 F.2d 951, 954 (9th Cir. 1969). The reasoning of *Owens* is particularly persuasive: of central importance is the absence of any indication in the language or legislative history of § 4002 that Congress intended to provide a private cause of action for prisoners or detainees. 601 F.2d at 1247-48. No indication exists, moreover, that Congress enacted the statute for the benefit of prisoners. *Id.* at 1247. These reasons require us to reject § 4002 as a vehicle for detainees such as Ortega and Gonzalez to compel the federal government's compliance. *See Cort v. Ash*, 422 U.S. 66, 78 (1975). We also conclude that 8 U.S.C. § 1252 and 18 U.S.C. § 4042 are equally unavailing to appellants, for the reasons stated by the district court.

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[3] This statute provides in part the following:

> For the purpose of providing suitable quarters for the safekeeping, care, and subsistence of all persons held under authority of any enactment of Congress, the Attorney General may contract, for a period not exceeding three years, with the proper authorities of any state, territory, or political subdivision thereof, for the imprisonment, susistence, care, and proper employment of such persons.

We turn now to appellants' constitutional claims. In its memorandum opinion, the district court regarded *Bell v. Wolfish*, 441 U.S. 520 (1979), as the starting point of its constitutional analysis. *Bell* first directs us to the due process clause rather than the eighth amendment in considering the claims of pretrial detainees. 441 U.S. at 535 & n.16. The parties also regard this as a due process case; Ortega and Gonzalez, for example, seek relief against the federal appellees directly under the fifth amendment's due process clause, while bringing the city in on a 42 U.S.C. § 1983 claim of conspiracy to violate detainees' due process rights as guaranteed by the fourteenth amendment. We agree with this assessment. Because the detainees' imprisonment did not result from their conviction for any crimes, the eighth amendment's prohibition of cruel and unusual punishment is inapplicable. *See id.* at 535 n.16, *quoting Ingraham v. Wright*, 430 U.S. 651, 671-72 n.40 (1977).

At trial and on appeal, the parties have devoted much attention to *Bell.* Recent Supreme Court cases, however, dramatically change the law of due process. In *Daniels v. Williams,* 474 U.S. ___, 88 L.Ed.2d 662, 666 (1986), the court concluded that "the Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty, or property." Although *Daniels* was a procedural due process case, the court's ruling goes further; "(a)s we held in *Daniels,* the protections of the Due Process Clause, whether procedural or substantive, are just not triggered by lack of due care by prison officials." *Davidson v. Cannon,* 474 U.S. ___, 88 L.Ed.2d 677, 683 (1986). Had these cases not come down, we would have resolved this case by following *Bell's* dictates, focusing on the purpose of the jails' conditions to decide whether unconstitutional punishment occurred. After *Daniels* and *Davidson,* however, we cannot resolve the case in this way if the conditions resulted from the negligence of the appellees. Indeed, in cases involving only simple negligence of the officials responsible, *Daniels* and *Davidson* render much of *Bell's* language surplusage. Only if the evidence suggests that the appellees knew of the jails' conditions, or intended to force the detainees to endure such conditions, would a *Bell* analysis retain vitality.

The district court found that the individual appellees lacked any intent to punish the detainees. Border Patrol agents, for example, provided blankets and cleaned up the cells. The court concluded that, in general, "those agents and officials corrected shortcomings in jail conditions when they learned of any deficiency." We certainly cannot question the court's findings because the record shows no evidence of officials' desire to punish the detainees, of their knowledge of their continuing discomfort, or of their reckless disregard of the squalid conditions. The most that can be said is that, objectively speaking, they were unreasonable—in other words, negligent—in failing to inspect the jails regularly.

On appeal, furthermore, the appellants really assert nothing more than negligent supervision. As mentioned before, they view this case as one in which the lack of specific rules under which the INS would use local jails, and the resulting confusion over who was responsible for the jails' upkeep, led to the lamentable conditions that the detainees were forced to endure.[4] By characterizing the problem in this way, appellants can only be saying that the appellees unreasonably neglected to establish clear guidelines. Apparently trying to avoid *Daniels* and *Davidson,* appellants characterize this confusion as "willful indifference." The facts of this case, however, show no more than a sloppy system of cooperation between federal and local authorities.[5] Blindly assuming away one's responsibilities without first discovering others' expectations can be seen as unreasonable—nothing more. This being so, appellees' conduct is not the kind proscribed by the due process clauses of the fifth and fourteenth amendments, as interpreted by *Daniels* and *Davidson.*

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[4] The following excerpts from appellants' brief reflect this position:

> (I)n virtually all aspects of the jail's operation, the city and INS each thought the other was in charge. As a consequence of this extraordinary confusion, plaintiffs and other detainees were left without supervision, their cells were not cleaned, no bedding was provided, and no one even bothered to turn on the heat in winter.

* * *

> After the city left the jail, responsibility for cleaning the cells was not clearly assigned to anyone. At the time INS was using the jail, Asst. Chief Bartley did not think the city had any responsibility for sanitation . . . Predictably, the cells were not cleaned.

* * *

> Agent Rowe assumed that the city was responsible for providing mattresses and blankets for INS's detainees, but, as with other matters, he did nothing to confirm that assumption . . . For its part, the city left cotton mattresses in the cells when its prisoners were removed in 1978, but assumed that INS took over responsibility for replacing and cleaning the mattresses after that . . . Because no one took responsibility for them, the mattresses left by the city were never cleaned and eventually deteriorated until there were none left, forcing detainees to sleep on the metal bunks or on the concrete floors of the cells.

At oral argument, counsel for appellants maintained this tack: the detainees' injuries resulted from the appellees' failure to divvy up the duties involved in maintaining the jails. This failure, moreover, arose from confusion more than anything else; in its brief, appellants allege that "by failing to clearly delineate responsibility for INS detainees placed in the custody of local facilities, INS procedures invited the kind of confusion which prevailed in Lubbock."

Appellants raise other issues: for example, they argue that the district court erred in not allowing the discovery of documents relating to the injury of a detainee. Even here, however, they apparently claim that the appellees were only negligent in incarcerating the detainee. *Daniels* and *Davidson* therefore render consideration of this allegation unnecessary. Similarly, we need not focus on other facts or issues arising from this complex case. The district court's judgment is AFFIRMED.

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[5] This is true especially in the light of the rather broad definition of "negligence" the *Davidson* Court makes. Petitioner there informed prison officials that other inmates had threatened him. The officials thus knew of possible dangers, yet did nothing to protect Davidson, whom another inmate eventually wounded seriously. While the officials' conduct could have easily been deemed reckless, the Court agreed with the district court's assessment that they had been only negligent. 88 L.Ed.2d at 682. If "negligence" describes the conduct there, it must surely do so here.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS LUBBOCK DIVISION

CIVIL ACTION NO. CA-5-81-198

NABOR ORTEGA, *et al.*,

Plaintiffs,

v.

BILL M. ROWE, *et al.*,

Defendants.

FILED

JUL 23 1985

MEMORANDUM OPINION

The named plaintiffs, Nabor Ortega (Ortega), and Aurelio Gonzalez (Gonzalez),[1] have filed their complaint against Bill M. Rowe (Rowe) and Hugh J. Rushton (Rushton), individually and as United States Border Patrol agents; the Immigration and Naturalization Service (INS); the Honorable Alan B. Henry, Mayor of the City of Lubbock; the City of Lubbock; and the United States of America as defendants. The defendant Rowe was Patrol Agent in charge of the Lubbock Station of the Border Patrol from July 1977 to August 1984, and the defendant Rushton has been Chief Patrol Agent of the Marfa Sector, the administrative area that includes the Lubbock Station, since 1980. The named plaintiffs bring their action on behalf of themselves individually and as representatives of a class constituting all persons who are or who will be incarcerated in city and county jails by agents of the Lubbock Station of the United States Border Patrol within its 28-county jurisdiction.

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[1] Juan Zavala was originally named as a plaintiff, but his claim as a plaintiff in the case was dismissed with prejudice pursuant to the agreement and stipulation of the parties. He remains in the case as a member of the class only. Also as a result of this stipulation and agreement, Zavala's testimony concerning the conditions and operation of the Slaton City Jail was removed from the court's consideration. (Tr. 992).

Plaintiffs base their suit on the allegations that they have been deprived of their due process rights under the Fifth Amendment to the Constitution of the United States and that the defendants have violated 8 U.S.C. § 1252 and 18 U.S.C. §§ 4002 and 4042. They also allege a conspiracy and violation by some of the defendants of 42 U.S.C. § 1983 and the Fourteenth Amendment to the U.S. Constitution.

The court has determined that jurisdiction is proper under 28 U.S.C. §§ 1331, 1343(3), and 1361 and 8 U.S.C. § 1329.

The case first came on for trial on September 19-23, 1983. The trial was suspended after this first session following an announcement by the parties that a settlement had been agreed upon. Because of the failure of settlement negotiations, however, the trial was recommenced on January 28, 1985, and an additional evidentiary hearing was held on May 14, 1985. The court has now received and considered all of the evidence, the pleadings in the case, and the briefs and arguments of the parties.

This Memorandum Opinion shall constitute the court's findings of fact and conclusions of law. Further, the stipulations of the parties contained in the Pre-Trial Order entered by the court on September 15, 1983 are incorporated herein as a part of the findings of fact.

The plaintiffs allege that upon their apprehension and detention by the Border Patrol as illegal aliens, they were incarcerated in various county and city jails lying within a 28-county area which is under the jurisdiction of the United States Border Patrol, Lubbock Station. Plaintiffs argue that the jails in which they were incarcerated do not meet minimal constitutional and statutory standards and that their detention in these jails under these circumstances amounts to a deprivation of their due process rights under the Fifth and Fourteenth Amendments to the U.S. Constitution.

CLAIMS OF THE NAMED PLAINTIFFS

The evidence established that Ortega was arrested by local police officers in Muleshoe, Texas on September 4, 1981. On September 7, after spending three nights and two days in the Bailey County Jail, he was removed from there by a Border Patrol Agent and transported to a jail in Lubbock, Texas which belonged to and was operated by the City of Lubbock. At that time the City of Lubbock no longer held prisoners in this jail, but instead incarcerated them in the Lubbock County Jail. Ortega testified that there were no mattresses or blankets in his cell at the Lubbock jail and that his cell was trashy with papers and old food cartons strewn on the floor. (Tr. 214-15). He stayed in the cell for three nights and two days, sleeping on a sheet metal bed in his work clothes. (Tr. 215). During his stay, Ortega had no access to a shower, soap, or towels. (Tr. 216). However, he never tried to take a shower in his cell, so he could not say whether or not it worked. (Tr. 242). He assumed that it did not work because the stall was covered with trash. (*Id*). The issue of shower availability during the period when Ortega was detained is unclear since some of the cells had showers that worked, and some were capped off and did not work. (Tr. 243). He also stated that the toilet in the cell was in working condition. (Tr.242). Finally, he testified that he never reported to any officials that the shower did not work or that he lacked any type of bedding supplies. *Id.*

While in custody, he received two meals a day that included eggs and bread for breakfast and chicken and potatoes for supper. (Tr. 216). Jail records indicate that there were nine other aliens in custody with Ortega in his cell between 4:00 P.M. on September 7 and 4:00 P.M. on September 8, 1981. (Plaintiff's Ex. 81.9). Ortega stated that the other nine detainees were removed from his cell on the day after he arrived. (Tr. 230). Ortega stayed in the cell an extra day until September 9 so that he could make a bond. (Tr. 231). The record indicates that the Consul of the Government of the Republic of Mexico visited Ortega while he was in the cell, (Tr. 229), and it also discloses that an attorney, Ms. Maria Mercado, met with Ortega on the same day. (*Id*).

Ortega claims that he suffered substantial physical injuries because of his detention in the Lubbock jail, but the record indicates that he went back to work within several days of his release. (Tr. 232). The evidence shows that he did not go to see a doctor or seek other medical treatment, and the court concludes that he does not suffer from any physical or emotional ailment resulting from his period of detention in the Lubbock jail facility.

The plaintiff Gonzalez was arrested by police officers of the Muleshoe City Police Department on December 5, 1981 and placed in the Bailey County Jail. Three days later on December 8, he was released to the custody of the Border Patrol and transferred to the same jail in Lubbock where Ortega had previously been held. He arrived in Lubbock at about 11:00 A.M., spent the night there, and left the cell at approximately 5:00 or 6:00 P.M. the following day, totaling approximately thirty hours spent in the Lubbock jail. (Tr. 321). There was no one in the cell with him during his detention in Lubbock. (Tr. 319, 333). He testified that this cell was cold and dirty with trash, papers, and old paper plates on the floor. (Tr. 319). The toilet and water fountain both worked, but there was no toilet paper. (Tr. 341, 343). There was no mattress or blanket in the cell, and he slept on a sheet metal bed in his clothes that included a heavy jacket. (Tr. 319, 339). Rowe testified that he provided a mattress and blanket to Gonzalez after observing that he was in the cell with out these items.(Tr. 119-20).

Gonzalez received two meals between the time of his arrival on the morning of December 8 and his departure on the afternoon of December 9. (Tr. 333). Upon his release from custody, he returned to work in Muleshoe immediately and did not go to see a physician. (Tr. 334). He also testified that he was allowed to speak with an attorney the day after he arrived in Lubbock. (Tr. 335). Although the officers of the Border Patrol did not mistreat him in any way, (Tr. 340), Gonzalez claims that he was humiliated and suffers mental anguish because of his detention. Based on the evidence, the court concludes that Gonzalez received no physical or emotional injury stemming from his short stay in the Lubbock jail.

CLAIMS OF THE CLASS MEMBERS

I. Jail conditions

Members of the class in this case attack the condition of local facilities used by the Lubbock Station, but not operated by the INS, to detain illegal aliens. It is therefore necessary to describe the evidence presented concerning each of these non-service facilities to determine whether the plaintiffs' statutory or constitutional rights have been violated.

LUBBOCK CITY JAIL

The Lubbock City Jail was the main non-service detention facility used by the Lubbock Station of the Border Patrol between July 1977 and December 1981. (Plaintiff's Ex. 77-81). In 1977 an agreement was reached between officials of the Border Patrol and the City of Lubbock which allowed the Border Patrol to house detainees in the

Lubbock City Jail. The price charged for each detainee was $6.50 per day. (Tr. 180-83). Later in 1977, the City of Lubbock ceased using the City Jail and began housing their prisoners in the Lubbock County Jail. At this time the Border Patrol was allowed to expand its use of the City Jail to include the downstairs holding cells as well as the two upstairs cells. This gave the Border Patrol a capacity of 72 bunks. (Tr. 612). The two upstairs holding cells are approximately 280 square feet in area and have 15 metal bunks, a toilet, water fountain, and shower. Downstairs in the facility are a number of smaller cells including four holding facilities. These holding cells vary in square footage from 139.4 square feet to 183 square feet. (Tr. 895). Although the city no longer housed its prisoners in this jail facility, it continued to provide personnel to supervise the jail as well as food, maintenance, and bedding. (Tr. 190, 418-21, 626, 186).

The Lubbock City Jail is located in the Lubbock Police Department, and after the city ceased using this jail facility, a police desk sergeant and other police officers were in close proximity to the cells and provided supervision. (Tr. 61-63, 70-71, 107). Since no jailer was any longer on duty, Border Patrol agents booked detainees into the facility themselves, unlocked the jail cells, and placed them in the cells themselves. (Tr. 589-90). Between 1977 and December 1981, the Border Patrol detained over 7,000 illegal aliens in the Lubbock City Jail, and there were no reports of personal injuries or fires. (Tr. 155-56). Although the Consul for the Republic of Mexico visited the Lubbock jail facility several times, he never complained about the conditions that he found there. (Tr. 167-69). In fact, during the entire period in which the Lubbock jail was utilized for detaining illegal aliens, there were no complaints concerning jail conditions made to the City of Lubbock, the Lubbock Station, or any other Border Patrol office. (Tr. 192-93, 625, 701).

A number of witnesses testified concerning conditions in the Lubbock jail facility, and the plaintiffs claim that this testimony proves that the conditions in the jail were unconstitutional. Isidro Ruiz testified that he and 40 to 45 other people were held in one upstairs cell in the Lubbock City Jail in August 1981. (Tr. 290-91). It is important to note, however, that Ruiz and the other detainees spent only three to four hours in this small cell together before being separated and moved to another cell downstairs. Ruiz testified that 15 or 16 other people were housed in the downstairs cell after the move. (Tr. 293). Ruiz was removed from the jail after spending only seven to eight hours there. (Tr. 294). He did not suffer any type of injuries while he was in detention, but he stated that the cells were trashy and unsanitary. (Tr. 292). Armando Andrade testified that there were more detainees than there were bunks in his cell during his period of detention in the jail. He stated that there were nine or ten other aliens held in the cell, and he was released from the cell after one and one-half to three and one-half hours when he was placed on a bus and transported back to Mexico. (Tr. 361, 365). Andrade testified that his cell was trashy and had a bad odor, but the toilet worked. (Tr. 362). As with Ruiz, Andrade suffered no injuries during his period of detention.

Although Ruiz and Andrade spent only a very short period in the Lubbock City Jail, there is some deposition testimony reflecting conditions over a longer period of time. Reyes Gardea was held in the Lubbock jail from February 27, 1981 at 6:00 P.M. until 9:00 P.M. on March 2, a period of 75 hours. (Plaintiff's Ex. 81.3). Gardea stated that he was in a cell with approximately 19 other aliens, so many that some had to sleep on the floor. (Deposition of Reyes Gardea at 4). There was no bedding to sleep on, and the cell was cold. (*Id.* at 5). Gardea suffered no injuries while in custody at the Lubbock City Jail. (*Id.* at 3-9). Cruz Estrada, his father Clemente Estrada, and two brothers were held in the Lubbock City Jail from July 4, 1981 at approximately 8:00 P.M. until 4:00 P.M. on July 6, 1981. (Plaintiff's Ex. 81.7). Cruz Estrada testified that there were 12 other persons in his cell, and about four of those had to sleep on the floor. (Deposition of Cruz Estrada at 11). His father, Clemente, estimated that there were 15 other persons in the cell, but he was not sure if any of them had to sleep on the floor. (Deposition of Clemente Estrada at 100). The Estradas suffered no injuries while in the jail facility. Martin Burrola was in the City Jail from May 29, 1978 at 5:00 P.M. until May 31 at 9:00 A.M., a total of forty hours. (Plaintiff's Ex. 78). He stated that there were more detainees in the cell than there were bunks. (Deposition of Martin Burrola at 85). Burrola suffered no injuries while detained in the Lubbock City Jail. Ramon Balderama testified in a July 28, 1983 deposition that he was held in the Lubbock City Jail for two days "last year." (Deposition of Ramon Balderama at 57-58). Border Patrol records indicate that he was actually detained on December 1-2, 1981 along with 13 other aliens. (Plaintiff's Ex. 81). Balderama suffered no injuries during his detention.

All of these witnesses stated that there were no mattresses or blankets in the cells where they were detained. They also testified that the cells were trashy, no person in charge cleaned out the cells, and the cell temperature was uncomfortable. They agreed that they received two meals per day while detained in Lubbock. In addition, they stated that officials of the Border Patrol and jail facility did not oblige their requests for bedding, cleaning assistance, or altered temperatures in the cells.

The court finds as facts that detention cells in the Lubbock City Jail were sometimes trashy, that cells were cleaned up infrequently, and that the cell temperature was not as warm in winter as some detainees would have liked or as cool in summer as some would have liked. The evidence contained in the depositions described above suggests that Border Patrol agents or officials of the City of Lubbock disregarded or ignored aliens' requests for necessary services or supplies, but the great weight of credible testimony is to the contrary and the court finds that these agents and officials corrected shortcomings in jail conditions when they learned of any deficiency.

Rowe testified that he obtained a mattress and blanket for the plaintiff Gonzalez once he learned that he required those items, (Tr. 119-20), and that this was the only incident when a detainee requested a mattress and bedding. (Tr. 165). He further testified that on 10 or 12 occasions he asked city personnel to clean certain locations in the jail, and the personnel involved complied with his requests. (Tr. 162-63). Border Patrol Agent Dwayne Mings reported a lack of mattresses or blankets to the desk sergeant when he observed such a situation. (Tr. 414). He observed city personnel carry mattresses up to certain cells where mattresses were missing. (Tr. 415). He also divided detainees into groups and placed them in different cells if he observed that there were more detainees than bunks. (Tr. 417). He often cleaned out the cells himself, though city janitors usually did so. (Tr. 418). He reported a broken shower facility that a detainee mentioned, and the shower was repaired. (Tr. 419). He checked on the temperature in the cells, requested temperature adjustments, and once repaired a broken window. (Tr. 423). Border Patrol Agent Donald Vaughan checked for trash in the cells before placing aliens there and would alert city personnel to have janitors clean the cell. (Tr. 626). He often cleared trash out of the cells himself before placing detainees there. (Tr. 627). Vaughan stated that the aliens themselves were in part responsible for the conditions in their cells since they sometimes destroyed mattresses and toilets. (Tr. 623). This evidence clearly indicates that Border Patrol agents and city personnel cared for detainee comfort and safety and took steps to make the aliens' short stay more comfortable.

The plaintiffs have raised serious complaints concerning lack of fire safety and inadequate detainee supervision in the Lubbock City Jail. It is true that there was no organized fire safety plan. However, the Lubbock Fire Marshal inspected the jail and all other city facilities every year. (Tr. 196). The record reflects no serious or minor injuries resulting from fire or smoke emergencies during the entire period of Border Patrol usage of the jail. The court concludes that fire provisions utilized by the Lubbock City Jail adequately protected the Border Patrol's detainees and did not expose them to a risk of injury by fire. It was apparent from the testimony that the supervision provided by the City of Lubbock through its desk sergeant and other personnel within hearing range of the detention cells was adequate to provide supervision of the aliens. Again, there was no organized plan for regular or constant supervision of the aliens other than the presence of the desk sergeant and other officials of the Lubbock City Police Department within close proximity to the detention cells. However, the Border Patrol agents stated that they looked in on aliens when they passed by the cells or moved the aliens. The easy access of Lubbock Police personnel to the detention facility protected the detainees from any harm that might have occurred. Of course, there is no instance reflected in the record of an incident involving any personal injury to a detainee in the Lubbock jail resulting from a lack of supervision or any other reason.

SLATON CITY JAIL

The Slaton City Jail was used to house Border Patrol detainees between December 1981 and December 1982. The agreement between the City of Slaton and the Border Patrol was not reduced to writing, but the Border Patrol understood that it could use a cell with six beds and an additional cell with four beds if that cell was available. (Tr. 124-25). Rowe furnished fire retardant mattresses for use in the Slaton City Jail, (Tr. 529, 550 and 579), and the City of Slaton provided additional mattresses. (Tr. 528-29). Border Patrol officers booked detainees into the facility, (Tr. 126, 429-30, 551, 596), and supervision was provided by the dispatcher at the front desk of the jail facility who was within hearing range of the cells. The dispatcher was a female police officer who was instructed to call on a male officer in case any disturbance occurred. Slaton police officials conducted periodic walk-through inspections of the jail to check on Border Patrol detainees, (Tr. 532, 551-52), and the response time in case an officer had to be called was less than three minutes. (Tr. 552). Also contained within the same building as the jail was the emergency medical service established to provide ambulance service to citizens of the City of Slaton. (Tr. 553). While in the Slaton jail, Border Patrol detainees were allowed visitation privileges and the use of telephones. (Tr. 547-48). Although there were no regular fire inspections ever performed at the jail, the record indicates that there were no fires during the period of use during 1982.

It is true that one Border Patrol detainee, Manuel Zavala, was injured while in custody in the Slaton City Jail. The circumstances surrounding his injury on September 7, 1982 are in dispute and are the subject of two civil actions presently pending in this court, Civil Action Nos. CA-5-84-56 and CA-5-84-157. However, for purposes of this suit, it is important to note that medical aid was provided to Zavala by the Slaton City Police Department, (Tr. 539-40), and that he received treatment for his injuries.

Zavala's injury was the only reported injury to a Border Patrol detainee involving the Slaton City Jail or any other non-service jail facility. The Consul for the Republic of Mexico visited the Slaton City Jail on a number of occasions and did not object to the conditions he found there. (Tr. 167-69 and 557). The officials of the Slaton City Jail received no complaints concerning the conditions during the period of Border Patrol use.

The record indicates that the cells in the Slaton City Jail were overcrowded on several occasions, but there is no credible evidence to indicate that such overcrowded conditions occurred over an extended period of time or were the standard practice in this jail.

PLAINVIEW CITY JAIL

The Plainview City Jail, located in the Plainview Police Department, was used by the Border Patrol to house detainees between 1977 and 1982. During this time, 30 detainees were held in 1977, 83 in 1978, 69 in 1979, 10 in 1980, 24 in 1981, and 56 in 1982. (Plaintiff's Exs. 77-82). Of the 272 aliens held at Plainview over that period, only 32 were held in excess of 72 hours. *Id.* The Border Patrol had access to the Plainview facility pursuant to an agreement entered into by Plainview officials and the Border Patrol. As with other agreements concerning non-service jails, there was no written contract describing in detail the requirements for use of the Plainview jail. Supervision in the Plainview jail consisted of a female police dispatcher who had a link to the jail through an audio intercom system. Also, there were periodic walk-throughs and inspections conducted by officers of the Plainview Police Department. (Tr. 499-500). There was no organized fire inspection procedure worked out between the Border Patrol and the Plainview officials, but the record indicates that there were no fire emergencies or any other type of medical emergencies during the period of the Border Patrol use of the Plainview jail. As with the Slaton City Jail, the Plainview City Jail is not currently used by the Border Patrol and has not been used since November 1982. (Tr. 512).

HASKELL COUNTY JAIL

The Border Patrol used the Haskell County Jail to detain illegal aliens in 1977, 1978, and 1981. (Plaintiff's Exs.

77-82). During that time, only one detainee was held for longer than 72 hours. Supervision of the jail facility at night was accomplished by a sheriff who lived upstairs in the jail, and if prisoners or detainees in the jail needed help or any service they were instructed to hit a pipe which ran through the cells into the sheriff's bedroom. (Depositon of G. T. Garrett at 29). Haskell County officials and the Border Patrol furnished detainees with a mattress. *Id.* at 15.

In 1981, 26 aliens were detained in the jail on one occasion, but these aliens were placed in jail at 8:00 P.M. on May 18, 1981 and were released on May 19 at 10:00 A.M., a total of only 14 hours. (Plaintiff's Ex. 81.5). During the period of use of the Haskell County Jail by the Border Patrol, there were no reports of fires or other types of emergencies affecting Border Patrol detainees.

VERNON CITY JAIL

Border Patrol officials used the Vernon City Jail to house detainees during 1977, 1978, 1980, 1981, and 1982. A total of 217 aliens were held during that period, with only six detained in excess of 72 hours. (Plaintiff's Exs. 77, 78, 80, 81 and 82). The jail is located in the Vernon Police Department, and supervision was provided by a person in the radio room and other police officers who were within hearing range. (Deposition of Wayne Hendrix at 14). There was no policy of requiring walk-through inspections of the detainees. As with other use of jail facilities by the Border Patrol, there was an agreement, although not a written agreement, governing Border Patrol use of the Vernon City Jail. (*Id.* at 5-6). Border Patrol agents booked detainees into the Vernon Jail facility, and local authorities were responsible for determining whether there was a sufficient number of mattresses for the detainees. (*Id.* at 18). When the Border Patrol needed to house a large number of detainees, Vernon officials opened doors connecting individual cells, giving the detainees access to the entire jail facility. (*Id.* at 37). There were six metal bunks in the cells for detainee use along with 12 to 15 mattresses that could be used to lie on. (*Id.* at 7, 12). It is true that at times there were more detainees than bunks or mattresses. However, these periods were short in duration. The longest periods were 14 hours on January 19-20, 1982, when 18 persons were detained, and 14 hours on January 18-19, 1982, when 14 were detained. (Plaintiff's Ex. 87.1). A larger number were housed in the jail in June 1982, but these persons were in the custody of a different station of the Border Patrol. (Tr. 885-86). During the period of Border Patrol use of the jail, there were no fires or other emergencies involving detainees in the Vernon City Jail.

LUBBOCK COUNTY JAIL

In 1983, the Border Patrol began using the Lubbock County Jail as its primary facility for the detention of illegal aliens. (Tr. 134). The Border Patrol detains aliens in this facility pursuant to an oral agreement entered into by Rowe and the Sheriff of Lubbock County in 1983. (Tr. 1139). Border Patrol Agents fill out cards on detainees placed into the facility. (Tr. 1104). The Lubbock County officials set aside one holding cell for Border Patrol use, but other cells were available for its use if needed and if the Sheriff was not using the space. (Tr. 1101). Any requirement for additional space is minimized since the Board Patrol operates a bus to transport aliens to the border every day. (Transcript of May 14, 1985 evidentiary hearing at 77) [hereinafter cited as Tr. Part II.] The record indicates that there have been no medical emergencies in the Lubbock County Jail during the period of Border Patrol use, (Tr. 1133), or any other types of emergencies. Supervision in the jail was entirely adequate.

The plaintiffs have presented evidence that the holding facilities in the jail were overcrowded on numerous occasions. (Plaintiffs' Ex. A). This exhibit is unreliable for a number of reasons. The record reflects that aliens were often transferred from one holding cell to another, and this move was not always reflected on the daily roster or booking cards relied on for the preparation of the exhibit. (Tr. Part II 10, 15). The policy in the jail was to house no more than eight persons in a holding cell and place any detainees over that number in an additional cell or cells. (Tr. Part II 12). Additionally, certain aliens detained in the jail were held on state charges for several days before passing to the custody of the Border Patrol, (Tr. Part II 38-36, 64-75), and this fact inflated the calculation of time spent in Border Patrol custody.

Despite these uncertainties, the court concludes that the holding cells in the Lubbock County Jail were not overcrowded for more than a short period of time at most, and the credible evidence indicates that these instances occurred rarely, if ever.

OTHER JAILS

Between 1977 and 1982, the Border Patrol used 35 local jails for the purpose of detaining illegal aliens. The only evidence in the record other than the evidence concerning the jails mentioned above to indicate jail conditions in these facilities is the rosters of Border Patrol detainees. (Plaintiffs' Exs. 77-82). These records reflect that detainees were only held for short periods of time and do not indicate any constitutional or statutory violation. Accordingly, the court will not engage in speculation concerning the conditions in these jails, and it determines that no constitutional violation occurred in these jail facilities.

II. Attorney Access

The plaintiffs assert that the Border Patrol denied them access to legal counsel and that this action violated their constitutional rights. The record indicates, however, that no plaintiff who wished to meet with an attorney was denied this right. It is true that attorneys were sometimes not able to meet with detainees at times of the lawyers' choosing. This happened because of logistical problems associated with having only four Border Patrol agents working in an office responsible for a 28-county area. There were occasions when all of the agents were away from the Lubbock office, and attorneys would have to rely on a telephone answering machine on which to leave messages. (Tr. 158-59). In addition, agents in the field could be contacted by radio from other law enforcement agencies or by telephone at their homes. (Tr. 158, 307, 459).

There were times when an alien could not be located and contacted by an attorney who wanted to see his prospective client until after he had already voluntarily left this country. (Tr. 344-47, 485). However, the record also showed Border Patrol agents would allow aliens to meet with an attorney, make a bond, and remain in this country even if the alien was scheduled to depart. (Tr. 460).

The record indicated that the Border Parol required local jail officials to not permit attorneys to meet with detainees unless the Border Patrol gave its permission. This created some inconvenience since it was sometimes difficult for attorneys to locate the Border Patrol agents to secure permission. However, the record does not indicate one instance when agents of the Border Patrol withheld permission for an attorney to contact an alien. On the contrary, the record reflects that attorneys often met with aliens. What inconvenience that arose concerning attorney access resulted from attorneys calling the Border Patrol office, not talking to an agent directly, and not following up on the attorney's desire to meet with an alien. In some of these instances, when the Border Patrol agent returned the lawyer's call after returning from the field, the alien would already have departed this country.

This evidence indicates that aliens who wished to meet with lawyers were able to do so and that Border Patrol personnel did not interfere with this right. Although logistical problems presented slight inconveniences to lawyers who wanted to contact prospective clients, there is absolutely no evidence to suggest a denial or serious infringment by Border Patrol personnel of the detainees' rights to contact and meet with attorneys.

III. Current Jail Procedures

Beginning in 1979, the INS determined that it would be advisable to establish uniform procedures for the use of service and non-service detention facilities by the Border Patrol across the United States. (Tr. 1022-25). The INS attempted to coordinate a joint program with the United States Marshals Service for the streamlining of jail procedures by the Border Patrol. (Tr. 1028). Nothing much else was done on this plan until the fall of 1982 because of the influx of Cuban and Haitian refugees into this country and the diversion of Border Patrol resources caused by this immigration. (Tr. 1032). In November and December 1982, the Border Patrol prepared and issued a first draft of policies and guidelines to be followed in detention facilities used by the Border Patrol. (Tr. 1032-33). On March 4, 1983, the INS issued a teletype that further described the guidelines established in December 1982. (Tr. 1037). These guidelines, patterned after those used by the United States Marshals Service, include four mandatory items concerning supervision, safety, emergency food service, and emergency medical care that each facility used by the Border Patrol had to meet. (Government's Ex. 23). These guidelines set a minimum required for any facility used by the Border Patrol to detain illegal aliens. (Tr. 1035).

After the issuance of the March 4, 1983 teletype, the Border Patrol began a program of inspecting the approximately 900 non-service jail facilities it used. As of January 1985, it had inspected approximately 300 of those facilities with 27 of them failing to pass inspection. (Tr. 1039-1040). Since 1983, the Lubbock Station of the Border Patrol has detained illegal aliens at the Hale County, Hockley County, Lubbock County, and Wichita Falls City Jails, each of which meets standards established by the Texas Jail Standards Commission or has contracts with the United States Marshals Service for the incarceration or detention of federal prisoners. (Tr. 153, 618-19, 1147).

The record indicates that the Border Patrol began contemplating a reorganization of its guidelines for use of non-service detention facilities as far back as 1980. Mr. Robert Schmidt, Senior Staff Advisor for Detention Operations to the Assistant Commissioner of INS, testified that the guidelines established in December 1982 were not drafted in response to the instant lawsuit. (Tr. 1036). The court specifically finds that these new procedures were the result of a nationwide change that had absolutely nothing to do with this lawsuit and certainly was not caused by this lawsuit. Accordingly, the plaintiffs cannot be prevailing parties to any extent under the test established in *Hennigan v. Ouachita Parish School Board*, 479 F.2d 1148 (5th Cir. 1985).

LIABILITY CLAIMS AGAINST THE DEFENDANTS

I. Failure to execute a written contract

The plaintiffs claim that they should recover from the INS and other federal defendants because they failed to enter into written contracts with all authorities that provided facilities for the detention of aliens within the Lubbock Station. As described above, Border Patrol agents entered into oral agreements with local officials to secure detention areas.

Under 18 U.S.C. § 4002 (1982), the Attorney General of the United States is authorized to contract with state and local agencies for the purpose of providing facilities for the detention and imprisonment of federal prisoners. The plain wording of the statute itself does not indicate that such a contract executed by the Attorney General must be written, and the court is aware of no legislative history or other authority to the contrary. The court therefore determines that any claim the plaintiffs might have under 18 U.S.C. § 4002 is not substantiated in this case since in each instance in which the border Patrol used a local jail, there was a contractual understanding between officers of the Border Patrol and the officials in charge of the local jail which permitted use of that jail by the Border Patrol, even though the agreement was not reduced to writing.

II. Claim under 8 U.S.C. § 1252 and 18 U.S.C. § 4042

The plaintiffs also claim a right of action against the defendants under 8 U.S.C. § 1252 (1982). This statute establishes a procedure for the orderly apprehension, detention, and deportation of illegal aliens. It authorizes the Attorney General to detain an alien pending deportation, § 1252(a), and permits detention following a final order of deportation in certain situations. Section 1252(c). There is no reference in the statute to any requirements for the condition of detention facilities or standards of detention procedures. Neither does it provide for any civil action to an alien detained in an allegedly substandard detention facility. The court therefore determines that the plaintiffs cannot recover from the defendants under 8 U.S.C. § 1252.

The court reaches the same conclusion concerning the claims raised under 18 U.S.C. § 4042 (1982). This statute is unavailable to the plaintiffs for two reasons. First, it applies to the responsibilities of the Bureau of Prisons, and as stated above, the plaintiffs were detained by the Attorney General in local jails pursuant to his authority to contract under 18 U.S.C. § 4002. The Bureau of Prisons at no time had charge of the plaintiffs, so § 4042 does not apply. Second, even if § 4042 was applicable, there is no private right of action authorized under it. *Owens v. Haas*, 601 F.2d 1242 (2d Cir.) *cert. denied*, 444 U.S. 980 (1979); *Williams v. United States*, 405 F.2d 951 (9th Cir. 1969). Assuming that § 4042 is available to the plaintiffs, the court determines that the conditions of detention and procedures used by the defendants in this case did not violate the duty imposed by § 4042 and described in *United States v Muniz*, 374 U.S. 150 (1963).

III. Constitutional claims

The plaintiffs in this case had not been convicted of any crime when they were detained by the Border Patrol. Therefore, in determining the constitutionality of their confinement, the court must apply the due process clause of the Fifth Amendment to the United States Constitution, not the cruel and unusual punishment clause of the Eighth Amendment. *Bell v. Wolfish*, 441 U.S. 520 (1979). Under this standard, the court must determine whether the conditions of confinement in this case amount to punishment as to the named plaintiffs and as to the class members. *Id.* In a case such as this one where a number of jail conditions and procedures are challenged, the court should apply the constitutional standard after considering the totality of the circumstances surrounding the plaintiffs' claims. *See Ruiz v. Estelle*, 679 F.2d 1115, 1139 (5th Cir. 1979).

As the Court in *Bell* noted,

> Not every disability imposed during pretrial detention amounts to "punishment" in the constitutional sense, however. Once the Government has exercised its conceded authority to detain a person pending trial, it obviously is entitled to employ devices that are calculated to effectuate this detention. Traditionally, this has meant confinement in a facility which, no matter how modern or how antiquated, results in restricting the movement of a detainee in a manner in which he would not be restricted if he simply were free to walk the streets pending trial. Whether it be called a jail, a prison, or a custodial center, the purpose of the facility is to detain. Loss of free-

> dom of choice and privacy are inherent incidents of confinement in such a facility. And the fact that such detention interferes with the detainee's understandable desire to live as comfortably as possible and with as little restraint as possible during confinement does not convert the conditions or restrictions of detention into "punishment."

441 U.S. at 537. The Court also provided guidance to those lower courts that must at the first instance determine whether conditions of confinement amount to unconstitutional punishment. In the absence of allegations that a condition was intended as punishment, the court must look to see if the conditions of detention were related to a legitimate government purpose. As the Court formulated the test,

> [I]f a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to "punishment." Conversely, if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees.

Id. at 539 (footnotes omitted). The Court also recognized in formulating this test that *de minimus* violations do not trigger liability, *Ingraham v. Wright*, 430 U.S. 651 (1977), and the Court implied thereby that each and every condition of confinement would not have to be evaluated under a legitimate government interest test.

Applying the *Bell* standard to the claims of the named plaintiffs, the court determines that no constitutional violation has occurred. The record discussed above clearly shows that both Ortega and Gonzalez were detained in the

Lubbock City Jail for a very short period of time, and the conditions of their confinement, though mildly unpleasant, were not so overcrowded, uncomfortable, or unclean as to rise to a constitutional deprivation.

However, even if these conditions did approach impermissible punishment, it is clear that they were associated with legitimate governmental goals. The purpose of the incarceration of Ortega and Gonzalez was to detain them so that they could be transported to an INS processing center in El Paso, Texas subject to their right to be released on bond. The detention of the plaintiffs by the agents of the Border Patrol was an incident of a legitimate governmental purpose, and no express intent has been shown on the part of the defendants to punish the plaintiffs. There was nothing arbitrary or purposeless about their detention, but the actions taken with respect to detention in the Lubbock City Jail were reasonable and necessary to carry out such legitimate governmental purpose.

The court recognizes that the plaintiffs, by cross-examination of the defendants' witnesses, brought out that specific conditions such as the lack of fire warning devises, two meals a day, no blankets or mattresses, and trashy floors, did not constitute a legitimate governmental purpose. While this may be so, in a strict sense, the fact of their detention and the totality of circumstances surrounding the detention served the legitimate governmental purpose of detaining them for a short period of time pending deportation. The court concludes that these conditions did not rise to a deprivation of constitutional rights or amount to punishment in any degree.

The court reaches the same determination with respect to the claims raised by members of the class. The evidence presented showed that aliens were detained for very short periods of times in conditions that were sometimes unpleasant, but never so totally unacceptable as to offend the Constitution. Even assuming that the conditions were serious enough to approach impermissible punishment, no evidence was presented that the Border Patrol intentionally imposed conditions on detainees to punish, and the court concludes that such conditions were related to the same legitimate governmental interest of apprehending illegal aliens and detaining them for a short time until they can be deported or make a bond that was just discussed.

With the exception of the *Zavala* incident in Slaton that is the subject of two other pending actions in this court, no alien detained in the jails used by the Border Patrol during the period that is under consideration was ever injured. The plaintiffs strenuously attack the lack of organized emergency and fire plans in the non-service jail facilities. However, the court concludes based on the absence of emergencies or injuries in the past coupled with the fact that the detention facilities at issue were in each instance in close proximity to or part of a police department that the plaintiffs were not subjected to an unreasonable risk of harm. There was adequate supervision in case the need arose for the aliens to be cared for.

The court concludes that the voluminous record accumulated at trial wholly fails to reveal constitutional violations such as those identified in *Jones v. Diamond*, 636 F.2d 1364 (5th Cir. 1981), and *Medina v. O'Neill*, 589 F.Supp. 1040 (S.D.Tex. 1984). The conditions of detention were mildly uncomfortable, and Border Patrol procedures were slightly inconvenient. They certainly were not violative of any constitutional rights since they were closely related to legitimate governmental interests and were not imposed in an attempt to punish.

LIABILITY OF THE CITY OF LUBBOCK

As indicated by the discussion of the defendants' liability above, it appears to the court that the City of Lubbock is not liable to the named plaintiffs or the members of the class for violation of constitutional or statutory rights. Since no constitutional or statutory violation was committed against the plaintiffs, the City would not be liable under the plaintiffs § 1983 conspiracy theory. However, the court determines that the City was not responsible to the plaintiffs for the conditions of the jail cells. Lubbock did not operate a jail, but only agreed to permit the Border Patrol to detain illegal aliens there after apprehension until they could be transported to an INS processing center. The evidence established that the plaintiff detainees, including the two named plaintiffs, were booked into the cells by the Border Patrol agents. Under the agreement between the City and the Border Patrol, the Government was to pay so much per day per detainee, and the City would furnish the cells and two meals a day. All other responsibility for the detention was upon the INS and not upon the City of Lubbock or its mayor. Therefore a judgment will be entered denying any recovery against the City of Lubbock or its mayor in favor of the plaintiffs.

INJUNCTIVE RELIEF

Since the court concludes that no violation of statutory or constitutional rights occurred in this case, an injunction will not issue. Therefore, the court need not determine the standing or mootness issues raised by the defendants in opposition to the plaintiffs' request for equitable relief.

CONCLUSION

Based on the consideration of the evidence, the briefs of the parties, and a painstaking review of all matters on file herein, the court determines that the individual and class action claims of the plaintiffs herein are without merit, and the defendents are not liable in any respect for the claims pressed by the plaintiffs. It appears based on a consideration of the totality of circumstances surrounding the confinement of Immigration and Naturalization Service detainees in the 28-county area encompassing the Lubbock Station of the United States Border Patrol, that use of non-service detention facilities did not amount to any deprivation of statutory or constitutional rights of the named plaintiffs or members of the class action in this case.

The plaintiffs' requests for damages and equitable intervention are accordingly Denied.

A Judgment will be entered accordingly.

The Clerk will furnish a copy hereof to each attorney.

ENTERED this 23rd day of July, 1985.

/s/ HALBERT O. WOODWARD
HALBERT O. WOODWARD
Chief Judge
Northern District of Texas

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 85-1531

NABOR ORTEGA, AURELIO GONZALEZ, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellants,

versus

BILL M. ROWE, individually and as U.S. Border Patrol Agent, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion August 11, 1986)

Before GEE, POLITZ and GARWOOD, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ THOMAS GEE
United States Circuit Judge
Filed October 14, 1986

(2)

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No. 86-1143

In The
Supreme Court of the United States
October Term, 1986

NABOR ORTEGA, AURELIO GONZALEZ,
and all others similarly situated,
Petitioners,
v.
BILL M. ROWE, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the U.S. Court of Appeals for the Fifth Circuit correctly applied the holdings of *Daniels v. Williams,* 474 U.S. —, 106 S.Ct. 662 (1986) and *Davidson v. Cannon,* 474 U.S. —, 106 S.Ct. 668 (1986) to the circumstances of this case?

2. Whether *Daniels v. Williams* and *Davidson v. Cannon* overrule *Bell v. Wolfish,* 441 U.S. 520, 99 S.Ct. 1861 (1979)?

3. Whether the courts below erred in holding that the conditions of confinement in Lubbock City Jail did ***not*** amount to punishment in violation of the Fifth Amendment or to a deprivation of Petitioners' constitutional or legal right to due process?

4. Whether Petitioners have standing in federal court to litigate a 42 U.S.C. § 1983 claim alleging due process deprivations under the Fourteenth Amendment against Respondent City of Lubbock, considering the restrictions of *Parratt v. Taylor,* 451 U.S. 527, 101 S.Ct. 1908 (1981), and notwithstanding the modification of *Parratt v. Taylor* by the holding in *Daniels v. Williams?*

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STATEMENT OF THE CASE

The original suit in this case[1] was filed by Petitioners on December 9, 1981, in the Northern District Court of Texas, alleging that conditions of confinement in Lubbock City Jail and other jails where Petitioners and other class members were incarcerated pending deportation amounted to deprivation of their due process rights under the Fifth and Fourteenth Amendments to the U.S. Constitution.

The case first came to trial on September 19-23, 1983. Among other conditions which were subsequently dropped on appeal, Petitioners complained of inadequate supervision and sanitation, lack of bedding, overcrowding, and inadequate fire safety and attorney access. The named plaintiffs, Ortega and Gonzalez, sought injunctive relief against INS and the City of Lubbock on behalf of themselves and their class and damages for themselves.

More than thirty (30) witnesses testified before the District Court issued a memorandum opinion July 23, 1985 (attached as Appendix B to Petitioner's Petition). The District Court found that Petitioners' claims were "without merit" and denied all relief sought by them; and, that the constitutional standard for conditions of confinement was not violated by defendants, pursuant to *Bell v. Wolfish,* 441 U.S. 520, 99 S.Ct. 1861 (1979).

Background facts may be found in the District Court's memorandum opinion which is App. B of the Petition. Such findings clearly dispute Petitioners' allegations and were upheld by the Fifth Circuit Court, on appeal.

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[1] This statement of the case is based on the findings of fact of the District Court and other undisputed facts in the record to which the District Court made no reference.

Petitioners complain of the conditions of confinement in Lubbock City Jail [Petition 5-6] as grounds for a Writ of Certiorari to issue. Petitioners allege that "the jail was effectively abandoned". Petition 5. The District Court did not find that the Lubbock City Jail had been abandoned, but only that at the time Petitioners were held there the City no longer used it to hold their own prisoners. The Court further found that the City "continued to provide personnel to supervise the jail as well as food, maintenance, and bedding." App. B 14a. Based on the evidence presented, the District Court determined that the supervision provided, even though not organized or constant, protected the Petitioners and other detainees from any harm that might have occurred. App. B 18a.

Petitioners further allege that the District Court's finding that the City's desk sergeants provided some supervision to the detainees was clearly erroneous because the desk sergeants were not formally assigned to supervise them. Petition 5. However, as a practical matter, the desk sergeants did supervise them, e.g. they brought them meals and bedding and were also in the same building with them.[2]

Petitioners exaggerate the bedding conditions in Lubbock Jail at the time Petitioners were housed there.[3] The

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[2] The testimony was that the desk sergeants didn't have the *names* of the detainees, nor were they willing to allow attorneys to visit detainees without prior Border Patrol approval. But this didn't prove that there was a lack of supervision. It had nothing to do with supervision.

[3] They allege that "[T]he cotton mattresses which were occasionally provided were never cleaned; they were simply left in the cells unwashed until they disintegrated." Petition 5.

District Court found no evidence to support such a claim. The Petitioners paraded forth a number of witnesses who allegedly went without adequate bedding while incarcerated in Lubbock City Jail, awaiting deportation. App. B 15a-16a. But the District Court found that 72 bunks were available to the detainees. App. B 14a. It also found that the great weight of *credible* testimony was to the contrary of those witnesses. App. B 17a. Credible evidence indicated that the cells utilized by Border Patrol in Lubbock City Jail were equipped with bunks, commodes, drinking fountains, and showers. App. B 14a.

Petitioner Gonzalez was not placed in a cell with overcrowded conditions, but rather alone. App. B 12a. He was provided a mattress and blanket once it was discovered his cell lacked those. App. B 17a. Likewise, Ortega was not placed in overcrowded conditions. App. B 12a.

The detainees usually didn't inform anyone when they lacked bedding, so the District Court believed. Id. The City maintained a supply of mattresses and blankets for use by detainees as late as December, 1981, (the date of the filing of this lawsuit) and attempted to furnish detainees with such when needed. App. B 14a. Any defects in Lubbock Jail brought to the attention of the City were corrected. App. B 17a.

As to the allegation regarding overcrowding, the average stay of illegal aliens there was 1.4 days. As testified to, any potential overcrowding in Lubbock Jail was alleviated by use of other cells in the facility. There is no evidence that Petitioners were ever forced to sleep on the floor of Lubbock Jail.

There was also evidence that the detainees themselves tore up the mattresses, and that such mattresses did not vanish through the deterioration of being uncleaned. Id.

Petitioners further complain of the sanitary conditions of Lubbock City Jail. Petition 5. The District Court found that overall, "the evidence clearly indicates that Border Patrol agents and City personnel cared for detainee comfort and safety and took steps to make the aliens' short stay more comfortable." App. B 17a. Further testimony supported the Trial Court's finding that the sanitary conditions of the detainees were acceptable.[4]

Petitioners allege that in the Lubbock Jail, "[N]o one even turned on the heat in the winter." Petition 5. Petitioners recite no evidence for their unfounded accusation. To the contrary, the record clearly supports the Court's finding that Petitioners were adequately cared for while in Lubbock Jail. App. B 17a.

Exhibits introduced into evidence showed that the area where federal detainees were housed was an internal part of the police station. To argue that this holding area was inhumanly or harshly cold while the rest of the premises attached to it were comfortably warm was not supported by the evidence. There was no dispute that the cell area was equipped with heating and cooling in working condition.[5]

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[4] The detainees were afforded functioning showers in Lubbock Jail [App. B 14a]; periodic, on-sight inspections were made [App. B 17a]; the only "unsanitary" conditions in federal detainees' cells were papers, cartons, and styrofoam containers strewn about the cell, or at times, torn up mattresses. The only "unsanitary" conditions in Petitioner Gonzalez's cell consisted of "trashy papers and old paper plates".

Gonzalez alleged his cell was cold, but in light of the facts and the testimony that he had all his clothes, a heavy jacket, and eventually a blanket, it seems his complaint of misery is exaggerated. Transcript 309-310, 319. Furthermore, he spent only one night in such alleged intolerable conditions. App. B 12a.

Petitioners allege that access to attorneys for them was difficult at best, as a result of the ''policy'' defendants had regarding visitation rights. Petition 6. However, the District Court held that the evidence indicated otherwise.[6]

Respondent City of Lubbock contends that the basic constitutional conditions at issue were factual in nature, and therefore, the District Court's findings of fact against

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[5] Of course, in the case of Ortega, the issue of heat was not important since he was housed there in the summer, September 1981. App. B 11a. Furthermore, he made no complaint about the heating.

[6] The District Court said, "aliens who wished to meet with lawyers were able to do so and that Border Patrol personnel did not interfere with this right. . . . [T]here is absolutely no evidence to suggest a denial or serious infringement by Border Patrol personnel of the detainees' right to contact and meet with attorneys." App. B 24a-25a. Contrary to the Petitioners' allegations that such visitation and access was denied, the record supported the Court's finding: federal detainees were extended the right to attorney access by the City through the instructions of Border Patrol. App. B 23a-25a; reasonable visitation was afforded for visitors of the illegal aliens housed in Lubbock Jail, including attorneys and the Consul for the Republic of Mexico. App. B 12a; Petitioner Ortega was afforded visitation and attorney access while incarcerated in Lubbock City Jail, [Id.], as was Appellant Gonzalez. App. B 13a.

Petitioners were not clearly erroneous because they were supported by the great weight of the evidence.

Even though Petitioners allege that the "Fifth Circuit affirmed on other grounds", implying that the Circuit Court was not ruling on the conditions of confinement, in fact, that was precisely what it was affirming: the District Court's finding that the conditions of confinement existing in the Lubbock City Jail did *not* amount to a constitutional deprivation against Petitioners. App. A 2a.[7]

The Fifth Circuit affirmed the District Court's judgment on all points, based upon the Circuit Court's reading of *Daniels v. Williams,* 474 U.S. —, 106 S.Ct. 662 (1986) and *Davidson v. Cannon,* 474 U.S. —, 106 S.Ct. 668 (1986).

* * *

SUMMARY OF ARGUMENT

Respondent City of Lubbock argues the following points in this Brief:

(1) The Fifth Circuit Court of Appeals correctly applied the holdings of ***Daniels v. Williams*** and ***Davidson v. Cannon*** to the circumstances of this case.

This case dealt with the conditions of confinement of INS detainees, not with negligent policies *per se.* The Fifth Circuit correctly applied the *Daniels* standard of due care to the *conduct* of government officials and was in no way creating a new or improper standard by which to measure the negligence of official conduct.

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[7] The main factual issue was whether "the conditions described violated their [Petitioners'] due process rights under the fifth amendment." App. A 3a. Only after the Circuit Court agreed with the correctness of the District Court's findings regarding the conditions, did the Circuit Court move on to the legal questions involved in the case.

The Fifth Circuit's holding and standard of negligence applied in this case do not conflict with other court holdings, so there is no justification for Court review.

The evidence is lacking that government "policy" caused the constitutional deprivations alleged. Under the *Daniels* ruling, the conditions were held to be negligent only.

The allegation that the Fifth Circuit adopted a higher standard than *Davidson* is unfounded. The Circuit Court merely applied the negligence standard formulated in *Daniels* and adopted in *Davidson.*

(2) The Fifth Circuit did not "overrule" *Bell v. Wolfish.*

The Fifth Circuit was attempting to overlay the *Bell* standard of evaluating conditions of confinement with the *Daniels* decision. *Bell* did not directly apply to the conditions in this case, since such conditions did not amount to punishment. The Fifth Circuit retained the *Bell* standard for conditions of confinement that fell outside the *Daniels* scenario.

The cases cited by Petitioners that allegedly show the Fifth Circuit erred can be distinguished.

(3) The courts below did not err in holding that the conditions of confinement in Lubbock City jail did *not* amount to constitutional deprivation or punishment in violation of the Fifth or Fourteenth Amendments.

The District Court found no violation of the *Bell* standard. Each condition complained of failed to be proved up as a constitutional deprivation. Without first showing a constitutional deprivation, damages or other relief cannot be awarded under 42 U.S.C. § 1983.

(4) Petitioners have no standing in federal court to litigate a 42 U.S.C. § 1983 claim alleging due process deprivations against Respondent City of Lubbock because *Parratt v. Taylor,* 451 U.S. 527, 101 S.Ct. 1908 (1981) mandates that Petitioners must seek relief in state court where a post deprivation remedy satisfying due process requirements is made available by state law. Although this issue was never reached by the lower courts, Respondent City of Lubbock maintains that negligence claims cannot be brought under § 1983.

Respondent respectfully submits that the opinion rendered in this case by the Fifth Circuit Court was clearly correct in all material holdings and that Petitioners' application for writ of certiorari should be denied.

ARGUMENT UNDER QUESTION ONE

QUESTION 1: Whether the United States Court of Appeals for the Fifth Circuit correctly applied the holdings of *Daniels v. Williams* and *Davidson v. Cannon* to the circumstances of this case?

I. Petitioners' argument regarding government policies does not apply.

Petitioners allege that one reason for issuing a writ of certiorari in this case is that the Fifth Circuit's opinion conflicts ''in principle'' with *Daniels*. Petition 9.[8] Petitioners claim that their injuries were ''caused by negligent policies'' not ''[N]egligent acts of individual officials'' [Petition 10], so *Daniels* does not even apply to this case.

Respondent City of Lubbock urges the Court to reject Petitioners' argument because it is untimely made. Petitioners never argued such a point on appeal, even though the application of the *Daniels* case was at issue at the appellate level. Therefore, they should not be allowed to argue now on final appeal the idea that their injuries were caused by certain government *policies* (as opposed to certain government *conduct*, as has been the issue since the trial on the merits), with the intent being to limit the application of *Daniels* to this case.

This ground for appeal should also be rejected because it is irrelevant to this case. The Fifth Circuit ruled on the *conduct* of Defendants in operating the Lubbock City Jail (i.e. conditions of confinement as maintained by City and federal officials), not on the *policies* of such Defendants. Therefore, the Fifth Circuit was correct in using the standard of negligence as espoused in *Daniels* to judge such conduct.

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[8] Petitioners claim that "[T]he Fifth Circuit's opinion in this case extends *Daniels* to hold that injuries caused by negligent government *policies* [*emphasis added*] do not state a due process violation either."

If negligent policies were ever at issue in this case, the District Court long ago ruled that the evidence was insufficient to find such. App. B 23a-26a, 30a-31a. Nor did the Fifth Circuit discover any evidence supporting the allegation that negligent government policies deprived Petitioners of their constitutional guarantees. App. A 2a, 4a.

The deprivation alleged in *Daniels* was the same type alleged in this case: a deprivation of their rights under the Due Process Clause of the Fourteenth Amendment. App. B 10a; App. A 3a; *Daniels,* at 663. Petitioners may allege the ground of negligent policies before this Court, but their allegations throughout this case have zeroed in on government officials' conduct towards them, e.g. Border Patrol agents, municipal officials, desk sergeants, etc.

Petitioners further discuss two lines of cases, once they have assumed the issue as being one of "policies" rather than official conduct. Petition 10-14. They claim that such cases conflict as to the standard of negligence that should be used in testing government policies for due process violations.[9]

Petitioners' analysis of policy v. conduct is both misleading and a waste of this Court's time. *Daniels* provided the Fifth Circuit a working definition of "negligence" with which to rule upon the issues of this case, including testing government officials' acts in confining Petitioners. Id at 663.[10] As the record in this case clearly reflects, there was no credible evidence to support the allegation that Defendants engaged in deliberate policies so as to deprive Petitioners of Due Process.

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[9] "This case provides an opportunity to resolve the apparent conflict between cases like *Wolff, Pembaur,* and *Owen,* in which the negligence or good faith of a policy is irrelevant to the finding of a due process violation, and cases like *Tuttle* and the others cited above in which a policy must manifest deliberate indifference in order to constitute a due process violation." Petition 14.

Petitioners further assume that "[U]nconstitutional conditions" existed in Lubbock City Jail. Petition 17. This was a burden of proof *not* met by Petitioners. App. B 29a. This Court held in *Whitley v. Albers*, — U.S. —, 106 S.Ct. 1078, 1088 (1986), "that any ground properly raised below may be urged as a basis for affirmance of the Court of Appeals' decision," including District Court findings. The District Court found no constitutional deprivations due to the conditions of confinement as measured by the standard set forth in *Bell v. Wolfish.* The Fifth Circuit found no constitutional violations under *Daniels* or *Davidson.* App. A 6a-7a.

This Court ruled in *Daniels* that Petitioners must prove a violation of any underlying constitutional right before it may make a claim under 42 U.S.C. § 1983.[11] Petitioners failed to prove such. All other arguments, including negligent policy arguments, become moot since

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[10] The *Daniels* Court said that negligence amounted to "causing unintended loss of or injury to life, liberty or property." The very reason this Court heard *Daniels* was to decide when a tort (negligence) rises to a constitutional deprivation. at 664. The same question was reviewed by the Fifth Circuit.

[11] *Daniels,* at 664: " . . . in any given 1983 suit, the plaintiff must still prove a violation of the underlying constitutional right; and depending on the right, merely negligent conduct may not be enough to state a claim."

Petitioners failed to meet this threshold burden of proof. The Fifth Circuit merely upheld such a finding as negligence under *Daniels,* based upon the District Court's findings of fact.

Petitioners listed numerous cases in an attempt to support their claim that the Fifth Circuit had misapplied *Daniels* by "extending" it to negligent government policies rather than individual acts by government officials. They cited *Pembaur v. City of Cincinnati,* — U.S. —, 106 S.Ct. 1292 (1986) to argue a different standard of negligence exists for government policies than for individuals as established in *Daniels.* Petition 10-14. Petitioners then allege that the Fifth Circuit was using the wrong standard to measure the negligence in this case by assuming the question was one of negligent policies, not negligent conduct.

But even in *Pembaur,* the § 1983 action was based upon the *conduct* of government officials (i.e. an illegal search), not any policy *per se.* The facts of *Pembaur* support the obvious proposition that a policy is actionable only if there is conduct under that policy which causes a constitutional tort.[12]

Petitioners next allege that a government policy may in and of itself cause a deprivation even though the negligence of the officials carrying out the policy do not. Petition 11. In another context, this argument might be valid.

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[12] *Pembaur,* at 1297, quoting *Monell v. New York City Dept. of Social Services,* 436 U.S. 658, 691, 98 S.Ct. 2018, 2036 (1978): "Congress did not intend municipalities to be held liable unless *action* pursuant to official municipal policy of some nature *caused a constitutional tort.*" [*emphasis added*].

However, where there is no proof of such deprivation-causing policies, the argument is only a mere whimsy. This Court's practice has been to not hear arguments which are not presented by the facts of the case on appeal.

Petitioners cite *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963 (1974) for the proposition that government "officials were liable because of the policy they were pursuing." Petition 11. This is a misreading of how *Daniels* distinguished *Wolff*. The *Daniels* decision distinguished *Wolff* on the standard of negligence applied to the conduct of the prison officials involved, not on the issue of individual negligence versus policy negligence.[13]

Petitioners further claim that "[T]he Fifth Circuit's decision to excuse 'negligent policies' directly contradicts *Owen*," infra. Petition 12-13. If *Owen* is saying that the "interactive behavior of . . . government officials" [Petition 13] unintentionally causes constitutional infringements, then perhaps this part of *Owen* is pared back by *Daniels* and *Davidson*. However, contrary to Petitioners' reading, *Owen* was still addressing injurious *conduct*, not negligent policies. It merely stated that official policies governing or promoting such unconstitutional conduct may make the policy makers themselves liable for such depriving conduct on the part of their agents. Granted, a municipality's policy will not be exonerated under *Owen* or *Monell*, even if the policy is implemented in good faith, but this does not make such cases inconsistent with either *Daniels* or this case.

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[13] The plaintiff in *Daniels* had cited *Wolff* for the proposition that "it is almost certain that *some* negligence claims are within 1983." The Supreme Court responded that in *Wolff*, the prison officials' deliberate decision to deprive (i.e. a state of mind, not a question of policy) was more than mere negligence, as found in the facts of *Daniels*. at 666.

In this case, no constitutional harm was found, only lack of due care on the part of some officials. Under the *Owen* holding, the policies in issue were likewise exonerated because there was no proof such policies either promoted the negligence of officials or caused its own deprivations. The cases that Petitioners cite found first that a municipality or other government entity was *liable* for policies that were fostering constitutionally depriving official acts. But these "policy" cases are relevant only if the policy is found to be depriving. There is no legal ground under our facts to justify resolving any apparent conflict between the cases cited by Petitioners.[14]

II. Fifth Circuit's definition of negligence not contrary to Davidson.

Petitioners allege a second ground in their attempt to get a writ granted: that the Fifth Circuit's definition of "deliberate indifference" was contrary to the reasoning of *Davidson v. Cannon*. Petition 18. Petitioners see the Fifth Circuit defining negligence as "deliberate indifference" then claim that this is fundamental error.[15] Apparently to Petitioners, the Fifth Circuit erred by citing to *Davidson* for a standard of negligence because (1) *Davidson* involved only a single isolated event, while this case had "blind neglect" for more than four years, and, (2) Davidson's negligence was not nearly as malicious as the "deliberate indifference" that was shown by defendants in this case.[16]

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[14] Petitioners urged that this case provides an opportunity to resolve the apparent conflict between cases life *Wolff, Pembaur,* and *Owen,* in which the negligence or good faith of a policy is irrelevant to the finding of a due process violation, and cases like *Tuttle* and the others cited above in which a policy must manifest deliberate indifference in order to constitute a due process violation. Petition 15-16. Under our facts, the standard of negligence as established by *Daniels* is clear when applied to questions of government officials' conduct. There is no need for such "apparent conflict" to be resolved.

The findings of fact by the courts below do not support Petitioners' position. The conduct of officials in *Davidson* was much more reckless than the conduct in this case. App. A 8a, fn 5. The conditions complained of in this case also involved single isolated events, not "blind neglect" going on for over four years. Evidence abounds that defendants corrected conditions once they knew about them. Such conditions were held to be simple negligence under *Davidson* and *Daniels*.

The allegations regarding the Slaton, Texas jail, at Petition 19, were not part of the findings by the District

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[15] Petitioners mystically equated *negligence* with *deliberate indifference* by stating "[T]he question of negligence or deliberate indifference was not before the Court in that [*Davidson*] case. . . . Since Davidson conceded the issue of negligence, the Court did not need to decide whether the same actions might have been characterized as deliberate or reckless indifference," Petition 18. Apparently, Petitioners think that defendant's conduct amounted to deliberate indifference. By allowing such conduct to be considered "negligence", the Fifth Circuit has vis a vis adopted the standard of conduct at the level of deliberate indifference. So the argument goes.

[16] Petitioners alleged that "[s]uch repeated failure to take corrective action should give rise to a presumption of deliberate indifference. . . . The record is clear that INS and the City of Lubbock knew or should have known of the squalid conditions in the Lubbock Jail." Petition 19.

Court in this case nor were they ruled upon by the Fifth Circuit. App. B 9a, fn 1. They are obviously added for inflammatory effect and should be disregarded as irrelevant to this case.

Petitioners demand a definition of "deliberate indifference" even though it is not a standard of negligence that was relied upon, either in this case, or in the companion flagship cases of *Daniels* and *Davidson*. Petition 20. The *Davidson* decision relied on the *Daniels* standard of negligence, which was something less than a deliberate decision to deprive. Id at 670.

The apparent problem that Petitioners allege here is that the courts have not set forth a cookbook, black-and-white definition of the various standards of negligence which can be printed in a paragraph or less. The courts have the judicial discretion and duty to decide what standard of negligence fits what facts. The justices in *Davidson* dissented not because the majority had failed to define or clarify the standard of negligence they relied upon, but rather, because the dissent believed that the conduct of the officials amounted to more than a lack of due care, i.e. recklessness. Id at 673.

The evidence does not support a finding of deliberate indifference in this case. The Fifth Circuit merely applied a simple negligence standard to conduct that was much less reckless or willful than what was ruled upon by *Davidson*. The Fifth Circuit was well aware of Petitioner's contention and held otherwise. App. A 8a.

Comparing the facts of this case to the allegations of Petitioners and to the holdings in *Davidson*, it is clear that the Fifth Circuit applied the correct standard of negligence in which to review defendants' conduct.

ARGUMENT UNDER QUESTION TWO

QUESTION 2: Whether *Daniels v. Williams* and *Davidson v. Cannon* overrule *Bell v. Wolfish?*

I. The opinions below do not conflict with Bell v. Wolfish.

Petitioners argue a third reason for granting the writ of certiorari: the Fifth Circuit's decision in this case conflicts with *Bell*. Petition 20. They claim that the Fifth Circuit opinion "overrules . . . in part" the *Bell* standard regarding jail conditions and unconstitutional punishment. Id.[17]

The effect of the Fifth Circuit's ruling on *Bell* is minimal in this case. The Circuit Court was not attempting to "overrule" *Bell* (how could a circuit court overrule a Supreme Court decision?), but instead was attempting to harmonize and integrate the *Bell* case with the *Daniels* and *Davidson* decisions.

Daniels directly centers on conditions of confinement [at 663], as does *Davidson* [at 669]. This case likewise bottomed on conditions of confinement. To ignore *Dan-*

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[17] The Fifth Circuit's discussion of *Bell v. Wolfish* is found in context at App. A, 51-61. Nowhere in its opinion does the Circuit Court expressly attempt to overrule the *Bell* holding, in *toto* or in part. Its ruling must be read in context with the impact *Daniels* has on *Bell*.

iels and *Davidson* would be as unwise by the Circuit Court as it would be to pay blind homage to *Bell.*

This case still doesn't alter the fact that in cases where the conditions of confinement amount to punishment under the Fifth Amendment, the *Bell* standard should apply. However, pursuant *Daniels* and *Davidson,* where such conditions are caused by the mere negligence (lack of due care) of officials, then such negligence does not amount to a deprivation of due process. *Daniels* does not say that such conditions do not have to be abated if they amount to punishment under the Fifth Amendment, nor does the opinion in this case. In fact, such an application of *Daniels* never presented itself to the Fifth Circuit because the conditions of confinement in the Lubbock Jail were never shown to amount to punishment under the *Bell* standard.

Petitioners assume without proof that defendants' "policies were inadequate to protect detainees from senseless punishment" [Petition 21-22] and that the Fifth Circuit imposed no liability for such "punishment". As a matter of proof, Petitioners failed woefully to prove such punishing conditions of confinement in this case. A case built on rhetoric and unproved accusations is not a legitimate case for a writ of certiorari. *Daniels* and *Davidson* makes conduct based on mere negligence not elevate to Fourteenth Amendment protection. The Fifth Circuit was merely following that dictate.

By clear implication, the Fifth Circuit was not intending to "overrule" *Bell v. Wolfish* as the Petitioners allege.[18] Petitioners make much ado about nothing because the Circuit Court didn't say "knew or should have known" instead of merely "knew". Petition 21-22, fn 17. The point is, the Fifth Circuit was distinguishing between standards of conduct and not looking for a way to excuse liability. By this language, the Circuit Court simply said that it would take more than mere negligence before conditions would come under the microscope of *Bell.*

But even if the Fifth Circuit deemphasized the holding of *Bell* in this case, the District Court adequately tested the circumstances against the *Bell* standard. App. B 28a-31a. In a thorough discussion, the District Court found that the conditions of confinement did *not* amount to punishment under *Bell.* Id.[19]

Petitioners again attempt to create a conflict between cases, hoping this Court will hear this case for that reason. Petition 23. However, the cases cited by Petitioners as being in apparent conflict with this case clearly do not govern.[20] The decision in this case does not necessarily conflict with *Bell.*

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[18] "Only if the evidence suggests that the appellees [defendants Lubbock and INS] knew of the jails' conditions, or intended to force the detainees to endure such conditions, would a *Bell* analysis retain vitality." App. A 6a.

[19] Accordingly, under *Whitley v. Albers,* at 1088, such a finding may be urged to affirm the Fifth Circuit's decision on this point. And even though the Circuit Court minimized the impact of *Bell* to these circumstances to some extent, it still incorporated the holding of the District Court regarding the *Bell* standard: "[T]he District Court found that the individual appellees lacked any intent to punish the detainees." App. A 6a.

[20] *Anela v. City of Wildwood,* 790 F.2d 1063 (3rd Cir. 1986), can be distinguished on the harshness of the conditions alone;

(Continued on following page)

ARGUMENT UNDER QUESTION THREE

QUESTION 3: Whether the courts below erred in holding that the conditions of confinement in Lubbock City Jail did *not* amount to punishment in violation of the Fifth Amendment or to a deprivation of Petitioners' constitutional or legal right to due process?

I. Case law and evidence supports the holding of the courts below.

Petitioners allege throughout this lawsuit that specific conditions of confinement amounted to constitutional deprivations and/or punishment, in spite of the evidence ruled upon by the courts below. Petition 6, 8, 23.

Respondent City contends that the courts below did not err in holding that the conditions of confinement in Lubbock City Jail did *not* amount to punishment in violation of the Fifth Amendment or to a deprivation of Peti-

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(Continued from previous page)

such conditions were found to be constitutionally depriving, unlike the conditions in this case. *Lareau v. Manson,* 651 F.2d 96 (2nd Cir. 1981), is a case dealing with long-term detainees' conditions that were alleged to be cruel and unusual punishment under the Eighth Amendment. The Eighth Amendment prohibition is inapplicable to pretrial detainees, *Bell* at 535, so such cases should also be inapplicable. *Union County Jail Inmates v. Di Buono,* 713 F.2d 984 (3rd Cir. 1983) was a case decided before *Daniels,* which also can be distinguished on the facts from this case. In *Union,* there was a finding by the district court that the conditions of confinement were constitutionally depriving under *Bell.*

tioners' constitutional or legal right to due process. Therefore, there is no issue in this matter upon which writ of review should issue.

The District Court in this case ruled, "in determining the constitutionality of [Petitioners'] confinement, the court must apply the due process clause of the Fifth Amendment. . . ." App. B 28a. The Court also said that a trial court should apply this constitutional standard "after considering the totality of the circumstances surrounding [Petitioners'] claims." Id. The District Court further noted that the Supreme Court "recognized in formulating this test that *de minimus* violations do not trigger liability. *Ingraham v. Wright,* 430 U.S. 651 (1977). . . ." App. B 29a.

The District Court then ruled, "[A]pplying the *Bell* standard to the claims of the [Petitioners], the court determines that no constitutional violation has occurred." App. B 29a.

Petitioners likened the problems in *Medina v. O'Neill,* 589 F.Supp. 1028 (S.D. Tex. 1984) to the conditions in this case. Petition 24. However, the District Court distinguished such case on the facts.[21]

Other case law supports the District Court's ruling. Compensatory damages can be awarded only if complainants can prove an infringement of federal constitutional rights. 42 U.S.C. § 1983; *Owen v. City of Independence,* 445 U.S. 622 (1980); *Baker v. McCollan,* 443 U.S. 137 (1979); *Martinez v. California,* 444 U.S. 277 (1980). Furthermore, only conditions of confinement that are severe or unconscionably intolerable or that violate basic concepts of decency constitute unconstitutional deprivations. *Novak v. Beto,* 453 F.2d 661 (5th Cir. 1971); *Adams v. Pate,* 445 F.2d 105 (7th Cir. 1971); *Hoitt v. Vitek,* 497 F.2d 598 (1st Cir. 1974); *Crowe v. Leeke,* 540 F.2d 740 (4th Cir. 1976); *Sostre v. McGinnis,* 442 F.2d 178 (2nd Cir. 1971), *cert. denied* 404 U.S. 1049 (1972).

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[21] "[T]he voluminous record accumulated at trial wholly fails to reveal constitutional violations such as those identified in *Jones v. Diamond,* 636 F.2d 1364 (5th Cir. 1981), and *Medina v. O'Neill,* 589 F.Supp. 1040 (S.D. Tex. 1984)." App. B 31a.

As to Petitioners' claim of lack of supervision constituting a due process deprivation, generally, alleging inadequate supervision, direction, or control, or supervisory liability for inaction, will not support a claim for § 1983 purposes. *Rizzo v. Goode,* 423 U.S. 362 (1976).

An overview of complainants' authorities on this question of supervision indicates their reliance on cases that have no weight to the instant case. Cases like *Lareau* are cases turning on the issue of cruel and unusual punishment under the Eighth Amendment. The Eighth Amendment prohibition of cruel and unusual punishment is inapplicable to pre-trial detainees. *Bell,* at 535. *Lareau* also made a clear distinction in standards as regards the length of the confinement. Id at 104-105. The law does not require constant supervision unless to do otherwise would constitute cruel and unusual punishment in violation of the Eighth Amendment. *Jones v. Diamond,* 636 F.2d 1364 (5th Cir. 1981).

Petitioners complain that defendants deprived them by "senselessly overcrowding them to the point that detainees had to sleep on the concrete floor with only the trash for bedding." Petition 6. The facts prove there was no overcrowding while Petitioners were incarcerated in Lubbock City Jail. Furthermore, Petitioners' argument that overcrowding is unconstitutional is not even a valid argument.[22] For overcrowding to be unconstitutional *per se,* there must be such an effect on other conditions so as to reduce them below a constitutional minima. *Rhodes v. Chapman,* 452 U.S. 337 (1981); *Bell.* Petitioners failed to prove that the conditions at the Lubbock City Jail fell below a constitutional minima.

Numerous other cases with *worse* conditions than the allegations in the instant case were held ***not*** to be violative of constitutional standards for incarceration. *Griffin v. Smith,* 493 F.Supp. 129 (W.D.N.Y. 1980), included challenged prison conditions of "fungus-infested showers," failure of officials to timely respond to inmate calls, and "lack of access to the regular visiting rooms." The District Court in that case further said "that as uncomfortable or disagreeable as these claimed conditions may be to Plaintiffs, they simply fail to describe deprivations of constitutional proportions."

In *Novak v. Beto,* supra, the court's constitutional standard was whether such conditions were "base, inhuman and barbaric." In *Novak,* plaintiff had no mattress, but it was not ruled to be depriving. Rather, a constitutional deprivation was when plaintiff was subjected to unscionably unsanitary conditions. Id at 665.

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[22] "Neither the number of inmates in one cell nor the amount of space provided for an inmate in a dormitory alone determines whether confinement is cruel and unusual." *Ruiz v. Estelle,* 679 F.2d 1115, 1146 (5th Cir. 1982).

The conditions in *Adams v. Pate*, supra, are similar to the instant case, e.g. "dusty and dirt infested", yet they were not "so foul, so inhuman and so violative of basic concepts of decency" to be a deprivation of constitutional magnitude under the Eighth Amendment, or any other Amendment.

Petitioners further claimed that "lack of mattresses" in this case violated due process. Petition 23. The District Court ruled the great weight of evidence showed that Petitioners were given adequate bedding. Petitioner Ortega never even complained about his alleged lack of a mattress or any other conditions of his cell, even though he had ample opportunity to do so. App. B 11a, 12a. Petitioner Gonzalez was provided both a mattress and a blanket, and he slept on a bunk. App. B 12a-13a. Petitioners did not prove as a matter of fact or law that they were unconstitutionally deprived of bedding.

Further, there is no proof submitted that complainants ever slept on the floor while housed in Lubbock City Jail. Petitioner Ortega admitted that he slept on a bunk in a cell with fifteen bunks. Transcript 215, 219, 230, 900. Rather, the City cells utilized by defendant Border Patrol were always equipped with metal bunks. App. B 14a. The City also maintained a supply of mattresses and blankets for use by detainees as late as when this lawsuit was filed, and attempted to furnish detainees with such when needed. Transcript 120, 186, 413-415, 422, 622-625. The District Court likewise found that the City "continued to provide personnel to supervise the jail as well as food, maintenance, and bedding." App. B 14a.

Petitioners complain of a lack of fire safety, but the District Court found otherwise when weighing the testimony and other evidence. App. B 18a.

Petitioners likewise complain that INS policy "severely limited visitation rights" of Petitioners.[23] However, the District Court found a legitimate justification for such INS procedures. The court did not find any legitimacy to Petitioners' claim regarding attorney access, especially since they were both afforded legal counsel. App. B 12a, 13a, 23a-24a. Petitioners wholly failed to prove any unconstitutional deprivation based on delay in visitation and attorney access. *Via v. Cliff*, 470 F.2d 271, 274 (3rd Cir. 1972); *Adams v. Carlson*, 488 F.2d 619 (7th Cir. 1973); *Crusoe v. DeRobertis*, 714 F.2d 752 (7th Cir. 1983). *Crusoe* says that "the Due Process Clause provides that a prisoner must be allowed 'meaningful access' to the courts . . . in order to present . . . 'violations of constitutional rights.' " But it is only obstruction or prohibition of attorney access that arises to constitutional infringement, not a delay based upon the legitimate interests of the authorities. Id at 755-756.

There was no evidence that Petitioners were ever denied attorney access, only that it was "delayed" until Respondent City could get the approval from INS. The City had a compelling reason to seek such approval: Federal detainees kept in City's jail were *INS* prisoners, not City prisoners. App. B 31a-32a. Respondent City had no jurisdiction or authority other than to feed and house the federal detainees. Id.

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[23] "[A]s a result many aliens were deported before their attorneys were able to speak with them or before they knew an attorney had been hired for them." Petition 6.

The findings of fact recited by the courts below, coupled with the cases argued above, clearly show that the courts below did not err in holding that the conditions complained of did *not* violate Petitioners' rights nor amount to punishment under the Fifth Amendment.

* * *

ARGUMENT UNDER QUESTION FOUR

QUESTION 4: Whether Petitioners have standing in federal court to litigate a 42 U.S.C. § 1983 claim alleging due process deprivations under the Fourteenth Amendment against Respondent City of Lubbock, considering the restrictions of *Parratt v. Taylor,* 451 U.S. 527, 101 S.Ct. 1908 (1981), and notwithstanding the modification of *Parratt* by the holding in *Daniels v. Williams?*

I. Petitioners have no standing to sue under 42 U.S.C. § 1983.

The decision in *Daniels* overruled *Parratt* "to the extent that it states mere lack of due care by a state official may 'deprive' an individual of life, liberty or property under the Fourteenth Amendment." Id at 665. However, the rest of the impact in *Parratt* apparently remains intact. It is the remaining rule of *Parratt* that Respondent City contends initially barred Petitioners from suing Respondent City of Lubbock under 42 U.S.C. § 1983 upon the facts found in this case.

Although Respondent timely filed its motion to dismiss pursuant to *Parratt,* the District Court never decided on its merit but instead found for the defendants on other grounds. App. B. The Fifth Circuit affirmed, also on other grounds besides *Parratt.* App. A.

Respondent City still contends that it is not liable as a matter of law under the doctrine of post-deprivation remedy as set forth in *Parratt.* Respondent alleges that Petitioners are afforded an adequate post-deprivation remedy available in state court that satisfies the requirements of due process. Therefore, they are barred from bringing a claim in federal district court under 42 U.S.C. § 1983 against Respondent City of Lubbock. *Parratt v. Taylor; Thibodeaux v. Bordelon,* 740 F.2d 329 (5th Cir. 1984).

CONCLUSION

Respondent City of Lubbock respectfully submits that the opinion rendered in this case by the U.S. Court of Appeals for the Fifth Circuit was clearly correct in all material holdings; that the decision in this case is not in conflict with the decision of another federal court of appeals or with applicable decisions of the U.S. Supreme Court on the same matter, so as to call for a review by this Court; that the decision in this case is not one which decided an important question of federal law which has not been, but should be, settled by this Court; and that, therefore, a review on writ of certiorari should not issue in this case because there are no special or important reasons to grant such writ.

WHEREFORE, Respondent City of Lubbock, Texas, and its Mayor, pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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③

No. 86-1143

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

NABOR ORTEGA AND AURELIO GONZALEZ, ETC., PETITIONERS

v.

BILL M. ROWE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the temporary detention of suspected illegal aliens pending further processing or deportation violated their Fifth Amendment due process rights when substandard conditions present in the detention facilities, if any, were caused by the negligence of government officials responsible for the facilities.

2. Whether the court of appeals correctly held that respondents did not act with "deliberate indifference" to the needs of detained aliens.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 796 F.2d 765. The opinion of the district court (Pet. App. 9a-33a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 1986. A petition for rehearing was denied on October 14, 1986 (Pet. App. 34a-35a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners represent a class of illegal aliens and suspected illegal aliens temporarily held pending further processing or deportation in detention facilities by the Lubbock Station of the United States Border Patrol of the Immigration and Naturalization Service (INS). The detention facilities are owned by cities and counties within the

jurisdiction of the Lubbock Station, which has contracted for their use. Petitioners allege that the conditions of the detention facilities were substandard and, on that basis, they seek damages and injunctive relief[1] from two INS officials (in their individual and official capacities), the INS, the United States, and the City of Lubbock and its mayor, for allegedly violating petitioners' due process rights under the Fifth and Fourteenth Amendments. Pet. App. 9a-11a.

2. Following trial, the district court dismissed petitioners' complaint (Pet. App. 9a-33a). Applying the test set forth in this Court's decision in *Bell* v. *Wolfish*, 441 U.S. 520 (1979), for determining whether pretrial detention violates a detainee's rights under the Due Process Clause, the court rejected the constitutional claims of the two named members of the class, Nabor Ortega and Aurelio Gonzalez, who were apprehended as they attempted to enter this country illegally and who were subsequently detained by the INS pending further processing or deportation (Pet. App. 28a-31a). The court found that both illegal aliens were detained "for a very short period of time, and the conditions of their confinement, though mildly unpleasant, were not so overcrowded, uncomfortable, or unclean as to rise to a constitutional deprivation" (*id.* at 30a). The court rejected (*id.* at 11a-13a) the claims of Ortega and Gonzalez that they were injured by their detention and expressly found that their detention caused neither any physical nor any emotional injury. Ortega and Gonzalez were in custody in the Lubbock City Jail for 24 and 31 hours, respectively (*ibid.*).

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[1] Petitioners do not, however, challenge the current conditions of the detention facilities used by the Lubbock Station (see Pet. 2). Pursuant to detailed guidelines issued by the INS in late 1982, the facilities now used by the INS at the Lubbock Station and nationwide meet established standards pertaining to supervision, safety, emergency food service, and emergency medical care (Pet. App. 25a-26a). As the district court found (Pet. App. 26a), these guidelines were not established in response to this lawsuit.

The district court next ruled (Pet. App. 30a) that even if the conditions of detention for the two named class members "approach[ed] impermissible punishment, it is clear that they were associated with legitimate governmental goals" and, hence, under *Bell* v. *Wolfish, supra*, the detention did not constitute "punishment" prohibited by the Fifth and Fourteenth Amendments. According to the court (Pet. App. 30a), their detention was an incident of a legitimate government purpose—the need to detain suspected illegal aliens pending their processing by INS in El Paso, Texas—and the conditions of detention did not rise to the level of a deprivation of constitutional rights or constitute punishment "in any degree."

The district court similarly held (Pet. App. 30a-31a) that the claims raised by the unnamed members of the class should be dismissed. The court found (*id.* at 30a) that the conditions of detention were sometimes "unpleasant, but never so totally unacceptable as to offend the Constitution." The court alternatively ruled (*id.* at 31a) that even if the conditions approached impermissible punishment, they did not amount to a constitutional violation because "they were closely related to legitimate governmental interests and were not imposed in an attempt to punish." The court stressed (*ibid.*) that, with one exception not relevant to the claims in this case (see *id.* at 9a n.1, 19a), no detained alien was ever injured or subjected to an unreasonable risk of harm, and there was adequate supervision for those aliens in need of care. The court explicitly rejected testimony on behalf of petitioners that Border Patrol agents or local officials disregarded or ignored petitioners' requests for necessary services and supplies, and that jails were overcrowded for extended periods of time. The court ruled that the weight of credible evidence was to the contrary and the court found that the "agents and officials corrected shortcomings in jail conditions when they learned of any deficiency" and that jails were not overcrowded for more than a short period of time at most. *Id.* at 17a-23a. The court similarly found that the evidence clearly supported a finding that the agents and local officials "cared for detainee comfort and safety" and "protected [them] from any harm" (*id.* at 17a-18a; see also *id.* at 19a, 22a).

Finally, the court rejected (*id.* at 23a-25a) petitioners' assertion that the Border Patrol deprived them of access to legal counsel. The court found (Pet. App. at 24a-25a) that no alien was denied his right to meet with counsel and while there may have been "slight inconveniences" to lawyers due to the logistics of having only four Border Patrol agents working in an office with a large geographic jurisdiction, there was "absolutely no evidence to suggest a denial or serious infringement by Border Patrol personnel of the detainees' rights to contact and meet with attorneys."

3. The court of appeals affirmed (Pet. App. 1a-8a). Relying on this Court's recent decisions in *Daniels* v. *Williams*, No. 84-5872 (Jan. 21, 1986) and *Davidson* v. *Cannon*, No. 84-6470 (Jan. 21, 1986), the court held (Pet. App. 6a-8a) that petitioners' due process claim should be dismissed because petitioners claimed, and the evidence at trial proved, at most only negligence in failing to inspect the jails regularly. The court found (*ibid.*) that there was no basis in the record for disturbing the district court's factual findings and the court of appeals explicitly rejected claims that the evidence showed that respondents knew of petitioners' discomfort, or acted in either reckless disregard of or "willful indifference" to the conditions of detention. According to the court (*id.* at 7a-8a & n.4), any shortfalls in respondents' maintenance of the detention facilities were simply caused by "confusion" and "a sloppy system of cooperation between federal and local authorities, * * * [which] is not the kind [of conduct] proscribed by the due process clauses of the fifth and fourteenth amendments" (*id.* at 8a (footnote omitted)).

ARGUMENT

The decision of the court of appeals is correct and it does not conflict with any decision of any other court of appeals or of this Court. Accordingly, this Court's review is not warranted.

1. Petitioners contend (Pet. 9-18) that the court of appeals misapplied this Court's decisions in *Daniels* v. *Williams, supra*, and *Davidson* v. *Cannon, supra*, in dismissing petitioners' due process claim. The court of appeals, however, correctly applied both those decisions, and petitioners' attempt to distinguish those decisions from the circumstances of this case fails.

In *Daniels*, this Court held that "the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty or property" (slip op. 1 (emphasis in original)). Accordingly, in both *Daniels* and *Davidson*, the Court ruled that an injury, even serious, to a prisoner caused by lack of due care by prison officials is not enough to trigger the protections of the Due Process Clause. As the court of appeals correctly held in this case (Pet. App. 5a-8a), *Daniels* and *Davidson* require dismissal of petitioners' due process claims because they rest, like the claims in *Daniels* and *Davidson*, on allegations that respondents acted negligently in maintaining the Lubbock Station detention facilities.

Petitioners attempt (Pet. 9-18) to distinguish *Daniels* and *Davidson* on the ground that this case involves "injuries caused by negligent government policies." Petitioners argue (*id.* at 10-11) that a negligent "policy," unlike negligent conduct, implicates the Due Process Clause because a policy, unlike conduct, is "deliberate, authorized action of government, regardless of whether the policy is adopted wilfully, negligently, or in good faith." Petitioners' proffered distinction between negligent "conduct" generally and negligent conduct caused by negligent "policy," however, is wholly illusory. In either case, the immediate cause of the injury is negligent conduct, and *Daniels* and *Davidson* therefore plainly control.

In addition, whether the cause of the condition of the detention facilities is labelled government "policy" or government "conduct," the considerations underlying *Daniels* and *Davidson* plainly apply in this case. As both the district court and court of appeals found (Pet. App. 6a-8a, 13a-23a, 28a-31a), the immediate and sole cause of petitioners' injuries, if any, was confusion between local and federal officials concerning their respective responsibilities in maintaining the detention facilities. The officials did not intend to impose substandard conditions on petitioners and acted to alleviate any problems when the officials learned of them. *Ibid.* In these circumstances, the government actions were in no sense "deliberate decisions of government officials to deprive a person of life, liberty or property" (*Daniels*, slip op. 4 (emphasis omitted)) and, hence, as in both *Daniels* and *Davidson*, petitioners' due process claim lacks merit. See *Davidson*, slip op. 3 ("[W]here a government official is merely negligent in causing the injury, no procedure for compensation is constitutionally required.").[2]

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[2] Petitioners' reliance (Pet. 12-13) on *Pembaur* v. *City of Cincinnati*, No. 84-1160 (Mar. 25, 1986), *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982), and *Owen* v. *City of Independence*, 445 U.S. 622 (1980), is misplaced. In each of those cases, the challenged governmental action was, unlike the actions at issue in this case, deliberate, intentional governmental action: a search authorized by the county prosecutor in *Pembaur*; a state agency's deliberate dismissal, pursuant to a state statute, of an employment discrimination charge in *Logan*; and a municipal officer's dismissal of an employee from public employment in *Owen*. None of those cases raised the issue whether negligent governmental policies provide the basis for a due process violation. Governmental policies were relevant in *Pembaur* and *Owen*, moreover, only in addressing the entirely distinct question whether the municipalities were liable for constitutional violations committed by its

2. Petitioners contend (Pet. 18-20) that the court of appeals' definition of "deliberate indifference" is contrary to this Court's decision in *Davidson*. The court of appeals' decision, however, is completely consistent with *Davidson*, which, petitioners admit (see Pet. 18), did not rule on the meaning of "deliberate indifference" (see *Davidson*, slip op. 3). The gravamen of petitioners' contention that respondents acted with "deliberate indifference" is petitioners' disagreement with the district court's factual findings, which were properly upheld by the court of appeals.

Petitioners claim (Pet. 19) that the record is clear that respondents "knew or should have known of the squalid conditions in the Lubbock jail" and that "[i]f such extraordinary disregard for the lives and safety of those in the government's custody does not amount to deliberate indifference, it is difficult to imagine what would." As stressed by the court of appeals (Pet. App. 6a), however, the district court explicitly found that respondents "lacked any intent to punish the detainees * * * [and] that, in general, 'those [Border Patrol] agents and [local] officials corrected shortcomings in jail conditions when they learned of any deficiency.' " Hence, absent reversal of the district court's findings as "clearly erroneous," petitioners' only remaining claim is that respondents "should have known" that there were problems with the detention facilities, which is itself a classic restatement of a negligence standard. The court of appeals therefore did not err in rejecting petitioners' claim that respondents acted with "deliberate indifference," and

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officiais. For this same reason, petitioners' additional claim (Pet. 14-18) that review is warranted to address a "conflict" (perceived by petitioners) between this Court's decisions in *Pembaur* and *Owen* and its decision in *City of Oklahoma* v. *Tuttle*, 471 U.S. 808 (1985), lacks merit. In *Tuttle*, as in *Pembaur* and *Owen*, the only issue raised and addressed by the Court was the liability of a municipality for the unconstitutional acts of its officers.

petitioners' contrary claim raises only factbound issues that do not warrant this Court's review.

3. Petitioners contend (Pet. 20-23) that the court of appeals' decision conflicts with this Court's decision in *Bell* v. *Wolfish*, 441 U.S. at 520 (1979). This contention lacks merit. In *Bell* v. *Wolfish*, 441 U.S. at 535-540, this Court set forth the test for determining whether conditions deliberately imposed by government on detainees were consistent with due process requirements.[3] In *Bell* v. *Wolfish*, however, this Court did not address the distinct issue, raised in this case and answered in *Daniels* and *Davidson*, whether the same constitutional analysis applied to conditions of detention that resulted from mere negligence or inadvertence. The court of appeals therefore properly relied on *Daniels* and *Davidson*, and its decision is not inconsistent with *Bell* v. *Wolfish*.

4. Petitioners' final contention (Pet. 23-25) that the issues raised in this case are important ignores events subsequent to petitioners' initiation of this lawsuit. As described by the district court (see Pet. App. 25a-26a), INS issued detailed guidelines in November 1982 (not in response to this lawsuit (see *id.* at 26a)) regarding operation of detention facilities, including minimum supervision, safety, emergency food service, and emergency medical care requirements. Petitioners do not challenge (see Pet. 2) the current conditions of the detention facilities used by the Lubbock Station, which since 1983 have met specific standards established pursuant to those INS guidelines (see Pet. App. 25a-26a). Petitioners' original request for injunctive relief therefore has been largely superseded by subsequent events,

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[3] The conditions challenged in *Bell* were all deliberately imposed. See 441 U.S. at 525-526 (double bunking); *id.* at 553 (restriction on receipt of packages); *id.* at 555 (unannounced searches); *id.* at 558 (body cavity searches).

and the issues presented by this case, which are rooted in INS policies long since discarded, are not of continuing importance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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(4)

No. 86-1143

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NABOR ORTEGA, AURELIO GONZALEZ,
and all other similarly situated,
Petitioners,

v.

BILL M. ROWE, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners Nabor Ortega and Aurelio Gonzalez submit this reply brief in support of their petition for a writ of certiorari pursuant to Supreme Court Rule 22.5.

I. THE PETITION DOES NOT REQUIRE REVIEW OF FACTUAL FINDINGS

Respondent City of Lubbock argues that certiorari should be denied because, according to the City, the petition seeks to have this Court review the factual findings of the district court. This argument has no merit. In reaching its decision, the Court of Appeals accepted as true the allegation that "the lack of specific rules under which INS used local jails . . . led to the lamentable conditions that the detainees were forced to endure," (Pet.App. at 7a), as well as Petitioners' description of the conditions of confinement set forth in footnote four of the Court's opinion. *Id.*[1] As the above quote makes clear, the Court also accepted as true the fact that INS' policies directly caused the conditions in the jails.[2]

Petitioners ask this Court to review the Fifth Circuit's legal conclusion: that jail conditions are not redressable under the due process clause when the policies which cause them result from negligence. This conclusion is erroneous. When government policies (or the total absence of them) have caused injury, the negligence or good faith in creating the policies is irrelevant to the existence of a constitutional violation.

The respondents also argue that Petitioners distinction between negligent policies and negligent individual conduct is illusory. To be sure, policies are implemented through individual conduct, but there is a clear distinction between situations where conduct is random and individual—such as dropping a pillow or forgetting a prisoner's note—and situations where government policy is the moving force behind conduct—such as in *Owen v. City of Independence, Pembaur*, and this case. It is only the latter conduct which represents an abuse of government power.

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[1] This was necessary because the district court made no findings with regard to Respondents' policy failings. Moreover, critical findings by the district court were inconsistent. *Compare,* Pet.App. at 14a ("Although the City no longer housed its prisoners in the jail facility, it continued to provide personnel to supervise the jail as well as food maintenance and bedding"), *with* Pet.App. at 32a (". . . the City was not responsible for the conditions of the jail cells. Lubbock did not operate a jail, but only agreed to allow the Border Patrol to detain illegal aliens there after apprehension . . .").

[2] This is what makes this case like *Owen v. City Independence,* 445 U.S. 622 (1980), and *Pembauer v. City of Cincinnati,* ___ U.S. ___, 106 S.Ct. 1292 (1986), and unlike *Oklahoma City v. Tuttle,* ___U.S. ___, 105 S.Ct. 2427 (1985), *City of Springfield v. Kibbe,* ___U.S. ___, 55 U.S.L.W. 4239 (Feb. 24, 1987), where the causal connection between the policy and the injury was indirect at best.

II. THAT RESPONDENTS SHOULD HAVE KNOWN OF THE PROBLEMS IN THE JAIL, AND DID NOT, CONSTITUTES DELIBERATE INDIFFERENCE

Petitioners argue that Respondents' actions amounted to deliberate indifference because they should have known that their blind neglect would lead to the deplorable conditions which existed in the jails. In reply, the Federal Respondents claim that Petitioners' should have known argument is "a classic restatement of a negligence standard." Brief for Resp. at 7. While this is true, negligence and deliberate indifference are not mutually exclusive. As discussed in detail by the court in *Doe v. New York City Department of Social Services*, 649 F.2d 134, 143-145 (2nd Cir. 1981), the difference between the two is a matter of degree. The more extreme the negligence the more appropriate it is to characterize it as deliberate indifference. Moreover, actual knowledge of the consequences of one's actions is not necessary to establish deliberate indifference. Deliberate indifference may be inferred where the risk of injury is known and no action is taken to ameliorate that risk, or where there is a pattern of inattention to a known duty to safeguard persons in one's care. *Id.* at 145. *Cf. Davidson v. Cannon,* 106 S.Ct. 668, 673 n. 2 (1986)(Blackmon, J., dissenting)("In some circumstances, the risk of injury is so high that the governments's failure to make efforts to avoid the injury is unacceptable, even if the omission still might be characterized as negligence); *Smith v. Wade,* 461 U.S. 30 (1983).

Incarcerating persons in a jail is obviously a dangerous activity—those incarcerated have effectively lost their ability to protect themselves—and the duty to assure that someone is in charge of a jail before leaving prisoners there is also obvious. In these circumstances, blindly assuming away one's responsibility for detainees must be seen as more than mere negligence; it evidences reckless and deliberate indifference for the rights and safety of detainees.

III. CURRENT INS JAIL POLICIES ARE INADEQUATE

According to the Federal Respondents, certiorari should be denied because Petitioners challenge past jail conditions which have been superceded by new INS jail use guidelines, issued in November 1982. Of necessity, Petitioners' evidence was limited to jail conditions as they existed at or before the time of trial, but that does not mean that Petitioners challenge only past jail conditions. Petitioners presented ample evidence to show that the unconstitutional jail conditions caused by Respondents' jail use policies continued for many years and would be likely to recur in the future absent injunctive relief. The November 1982 INS guidelines, which were the subject of considerable testimony at trial, only highlight the continuing need for injunctive relief.

The only jail expert to testify at trial[3] stated that INS' November 1982 guidelines were totally inadequate to protect detainees. Those guidelines still do not correct many of the problems which led to the confusion and deplorable conditions in Lubbock. They still do not require a written contract with local authorities or any written statement setting forth the division of responsibilities between INS and local authorities. The guidelines contain no provision for monitoring or limiting overcrowding of cells by INS agents. They do not even allow INS to keep a record of how many beds each jail has available for use by INS. Perhaps most shocking, while the new guidelines prohibit the use of jails which have failed a fire inspection, they authorize the use of jails which have never been inspected for fire safety or which are not subject to fire inspections.[4]

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[3] Arnold Pontesso was warden of the Federal Reformatory at

Plainly the November 1982 guidelines have done nothing to eliminate the problems raised by this suit, problems which affect INS' use of local jails throughout the country. Given the continuing national significance of the issues raised by this suit, it is appropriate to grant certiorari.

CONCLUSION

For the reasons set forth above and in the Petition for a Writ of Certiorari, the Court should grant the

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El Reno, Oklahoma and Director of Corrections for the State of Oklahoma. Prior to this case he testified as a jail expert for the U.S. Department of Justice. He was called by Petitioners; neither INS nor the City called a jail expert or a jail administrator to testify.

[4] This is a problem in city jails in small towns where local fire codes are limited or non-existent. E.g. The only fire code provision applicable to the city jail in Dalhart, Texas, a jail frequently used by INS, prohibits the burning of trash outdoors.

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Respectfully submitted,

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